

78 Am. Jur. 2d Waters Summary

American Jurisprudence, Second Edition | May 2021 Update

Waters

Janice Holben, J.D., Alan J. Jacobs, J.D., Jack K. Levin, J.D., and Eric C. Surette, J.D.

Correlation Table

Summary

Scope:

This article concerns waters, watercourses and waterways, and bodies and accumulations of water; water rights, liabilities, and nuisances; the beds, banks, and shores of waters; and islands. The discussion covers both natural and artificial watercourses and waterways; both navigable and nonnavigable waters; lakes, ponds, and reservoirs; subterranean waters, including underground streams, percolating waters, artesian basins, wells, and springs; "surface" waters; and floodwaters. The water rights discussed include those of riparian or littoral proprietors; the right to divert, extract, and use waters; and water rights acquired by appropriation or prescription.

Federal Aspects:

Various provisions of Title 33 of the United States Code (dealing with Navigable Waters) are cited in the article, as well as provisions from Title 43 (Public Lands). A few other federal statutes are also discussed, such as the definition of navigable waters (16 U.S.C.A. § 796(8)), the provision allocating exclusive jurisdiction over disputes between states to the U.S. Supreme Court (28 U.S.C.A. § 1251(a)), and the federal response to the effects of climate change on U.S. waters (42 U.S.C.A. §§ 10361 to 10370).

Treated Elsewhere:

Admiralty matters, see [Am. Jur. 2d, Admiralty §§ 1 et seq.](#)

Boats and ships, see [Am. Jur. 2d, Boats and Boating §§ 1 et seq.](#); [Am. Jur. 2d, Ferries §§ 1 et seq.](#); [Am. Jur. 2d, Shipping §§ 1 et seq.](#)

Boundaries to private property, see [Am. Jur. 2d, Boundaries §§ 9 to 26](#); and as to public boundaries, see [Am. Jur. 2d, Municipal Corporations, Counties, and Other Political Subdivisions § 26](#); [Am. Jur. 2d, States, Territories, and Dependencies §§ 26 to 35](#); [Am. Jur. 2d, International Law §§ 32, 33](#)

Bridges, generally, see [Am. Jur. 2d, Highways, Streets and Bridges §§ 1 et seq.](#); [Am. Jur. 2d, Railroads §§ 114 to 118](#)

Canals, see [Am. Jur. 2d, Canals §§ 1 et seq.](#)

Drains and sewers and drainage districts, see [Am. Jur. 2d, Drains and Drainage Districts §§ 1 et seq.](#); [Am. Jur. 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 501 to 507](#); [Am. Jur. 2d, Municipal, School, and State Tort Liability §§ 324 to 348](#)

Eminent domain exercised with regard to water rights and land bordering on water, see [Am. Jur. 2d, Eminent Domain §§ 181 to 189](#)

Fish and fisheries, see Am. Jur. 2d, Fish, Game, and Wildlife Preservation §§ 1 et seq.

Floating of logs and timber, see [Am. Jur. 2d, Logs and Timber §§ 73 to 92](#)

Irrigation, see [Am. Jur. 2d, Irrigation §§ 1 et seq.](#)

Jurisdiction over international waters, see [Am. Jur. 2d, International Law §§ 75 to 82](#)

Levees and flood control, see [Am. Jur. 2d, Levees and Flood Control §§ 1 et seq.](#)

Liability for personal injuries or death resulting from the ownership and control of premises on which there are located waters or water hazards, including swimming pools, see [Am. Jur. 2d, Premises Liability §§ 369 to 386, 626 to 637, 754 to 756](#)

Marine insurance, see [Am. Jur. 2d, Insurance §§ 642 to 666, 1287 to 1311, 1512 to 1523](#)

Navigation regulations, see [Am. Jur. 2d, Boats and Boating §§ 17 to 22; Am. Jur. 2d, Shipping §§ 102 to 105, 503 to 532](#)

Waterworks and water companies, see [Am. Jur. 2d, Waterworks and Water Companies §§ 1 et seq.](#)

Water pollution, see [Am. Jur. 2d, Pollution Control §§ 675 to 1035](#)

Wharves, piers, and docks, see [Am. Jur. 2d, Wharves §§ 1 et seq.](#)

Research References:

Westlaw Databases

- [All Federal Cases \(ALLFEDS\)](#)
- [All State Cases \(ALLSTATES\)](#)
- [American Law Reports \(ALR\)](#)
- [West's A.L.R. Digest \(ALRDIGEST\)](#)
- [American Jurisprudence 2d \(AMJUR\)](#)
- [American Jurisprudence Legal Forms 2d \(AMJUR-LF\)](#)
- [American Jurisprudence Proof of Facts \(AMJUR-POF\)](#)
- [American Jurisprudence Pleading and Practice Forms Annotated \(AMJUR-PP\)](#)
- [American Jurisprudence Trials \(AMJUR-TRIALS\)](#)
- [Code of Federal Regulations \(CFR\)](#)
- [Causes of Action \(COA\)](#)
- [Federal Procedure \(FEDPROC\)](#)
- [Federal Procedural Forms \(FEDPROF\)](#)
- [Uniform Laws Annotated \(ULA\)](#)

United States Code Annotated (USCA)

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78 Am. Jur. 2d Waters I Refs.

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Waters

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I. Introduction

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Research References

West's Key Number Digest

West's Key Number Digest, [Water Law](#)  1001 to 1003, 1005 to 1016

A.L.R. Library

A.L.R. Index, Waters and Watercourses

West's A.L.R. Digest, [Water Law](#)  1001 to 1003, 1005 to 1016

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78 Am. Jur. 2d Waters § 1

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Waters

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I. Introduction

§ 1. Generally; status as property

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West's Key Number Digest

West's Key Number Digest, Water Law 1001, 1002

Water in its natural state is a part of the land and therefore real property.¹ Individuals, as opposed to governments, cannot own water in its natural state, but individuals may own the right to use water.² Water may be converted into personal property by segregation from the natural stream or body³ although it has been held that water flowing in a canal or artificial conduit, and delivered from it onto land for irrigation, does not change its character from realty to personality.⁴

Caution:

Although private concerns cannot generally own water, a nonnavigable lake formed in an abandoned quarry was held to be privately owned by the parties who owned the land beneath the water's surface and the lands abutting it where each of their deeds included part of the lake bed.⁵ A "private lake" is a body of water on the surface of land within the exclusive dominion and control of the surrounding landowners.⁶ A lake or stream that is considered unnavigable may be privately owned and controlled; a body of water that is navigable but not necessary for commerce may be privately owned, subject to a right of access in the public.⁷ Small waters and man-made lakes and ponds are susceptible of private ownership, and where they are privately owned, they cannot be taken without just compensation.⁸

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Footnotes

- 1 [Smith v. Municipal Court, 202 Cal. App. 3d 685, 245 Cal. Rptr. 300 \(1st Dist. 1988\).](#)
As to the nature of water as a mineral, see [Am. Jur. 2d, Mines and Minerals § 8.](#)
- 2 [CRV Enterprises, Inc. v. U.S., 626 F.3d 1241 \(Fed. Cir. 2010\), cert. denied, 131 S. Ct. 2459, 179 L. Ed. 2d 1211 \(2011\) \(applying California law\); Turlock Irr. Dist. v. Zanker, 140 Cal. App. 4th 1047, 45 Cal. Rptr. 3d 167 \(5th Dist. 2006\); Kobobel v. State, Dept. of Natural Resources, 249 P.3d 1127 \(Colo. 2011\), cert. denied, 132 S. Ct. 252, 181 L. Ed. 2d 145 \(2011\).](#)
- 3 [McCarter v. Hudson County Water Co., 70 N.J. Eq. 695, 65 A. 489 \(Ct. Err. & App. 1906\).](#)
- 4 [Stanislaus Water Co. v. Bachman, 152 Cal. 716, 93 P. 858 \(1908\).](#)
- 5 [Orr v. Mortvedt, 735 N.W.2d 610 \(Iowa 2007\).](#)
- 6 [Carnahan v. Moriah Property Owners Ass'n, Inc., 716 N.E.2d 437 \(Ind. 1999\).](#)
- 7 [The Pointe, LLC v. Lake Management Ass'n, Inc., 50 S.W.3d 471 \(Tenn. Ct. App. 2000\).](#)
- 8 [Ryals v. Pigott, 580 So. 2d 1140 \(Miss. 1990\).](#)

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78 Am. Jur. 2d Waters § 2

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Waters

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I. Introduction

§ 2. Governmental control and regulation of waters

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, Water Law 1005 to 1016

Forms

[Am. Jur. Legal Forms 2d §§ 153:12 to 153:16, 153:43 to 153:46, 153:48 to 153:58, 153:60, 153:62 to 153:69](#) (Legal forms pertaining to irrigation)

[Am. Jur. Legal Forms 2d §§ 260:3, 260:4, 260:8](#) (Legal forms pertaining to rights and interests in water)

[Am. Jur. Pleading and Practice Forms, Irrigation §§ 19, 20](#) (Complaint, petition, or declaration—Breach of agreement to furnish irrigation water)

The use of natural streams and bodies of water is subject to reasonable regulation by the public authority, in the public interest.¹

Subject to constitutional restrictions upon the interference with property rights, a state has dominion and control, in its sovereign capacity, over the waters within its boundaries.² A state may adopt and enforce appropriate measures for the protection and conservation of such waters.³ States have responsibility to protect as a public trust resources associated with a state's waterways, such as navigation, fisheries, recreation, ecological preservation, and related beneficial uses.⁴ The State must preserve the state's waters for the trust's beneficiaries, and the State can bring suit to protect the waters over which it is trustee.⁵

The regulatory power of a state in respect of waters may, within limitations, be delegated to an administrative body or commission.⁶ Such power may, for local governmental purposes, be delegated to municipal corporations.⁷ Local governmental units may be granted authority over watercourses within their territorial jurisdiction while the State retains the authority to engage in regional or statewide regulation as needed.⁸

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Footnotes

1 [Head v. Amoskeag Mfg. Co.](#), 113 U.S. 9, 5 S. Ct. 441, 28 L. Ed. 889 (1885).
As to control and regulation of navigable waters, see §§ [147](#), [148](#), [151](#), [153](#) to [157](#).
As to control and regulation of surface waters, see [§ 198](#).
As to control and regulation of subterranean waters, see [§ 219](#).
As to public authorization and regulation of obstruction or detention of the waters of natural streams, see [§ 100](#).
As to control and regulation of riparian and littoral rights, see [§ 38](#).
As to control and regulation of diversion and use of water, see [§ 68](#).
As to control and regulation of appropriation, see [§ 359](#).
As to control and regulation of lands underlying water, see §§ [301](#), [302](#).
As to pollution control, see [Am. Jur. 2d, Pollution Control](#) §§ [675](#) to [1035](#).
As to flood control measures, see [Am. Jur. 2d, Levees and Flood Control](#) §§ [1](#) et seq.

2 [City of Trenton v. State of New Jersey](#), 262 U.S. 182, 43 S. Ct. 534, 67 L. Ed. 937, 29 A.L.R. 1471 (1923).
Ownership of the bed of a nonnavigable stream vests in the owner the exclusive right of control of everything above the stream bed, subject only to constitutional and statutory limitations, restrictions, and regulations.
[People v. Emmert](#), 198 Colo. 137, 597 P.2d 1025, 6 A.L.R.4th 1016 (1979).

3 [In re Opinion of the Justices](#), 103 Me. 506, 69 A. 627 (1908).

4 [Casitas Mun. Water Dist. v. U.S.](#), 102 Fed. Cl. 443 (2011), aff'd, [2013 WL 692763](#) (Fed. Cir. 2013) (applying California law).

5 [State v. Hess Corp.](#), 161 N.H. 426, 20 A.3d 212 (2011), as modified on denial of reconsideration, (Mar. 22, 2011).

6 [Ouachita Power Co. v. Donaghey](#), 106 Ark. 48, 152 S.W. 1012 (1912).
A vote by acreage scheme constituted a fair and reasonable method for the election of supervisors to govern a water control district where the evidence established that the district did not exercise general governmental functions and that each of the functions performed by the district directly related either to its water control function or to its limited road maintenance authority. [Stelzel v. South Indian River Water Control Dist.](#), 486 So. 2d 65 (Fla. 4th DCA 1986).

7 [In re Board of Water Com'rs of City of Hartford](#), 87 Conn. 193, 87 A. 870 (1913), aff'd, [241 U.S. 649](#), 36 S. Ct. 552, 60 L. Ed. 1221 (1916); [City of Montpelier v. Barnett](#), 2012 VT 32, 49 A.3d 120 (Vt. 2012).

8 [Town of Avon v. West Central Conservancy Dist.](#), 957 N.E.2d 598 (Ind. 2011).

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78 Am. Jur. 2d Waters § 3

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Waters

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I. Introduction

§ 3. Governmental control and regulation of waters—Federal authority

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West's Key Number Digest

West's Key Number Digest, Water Law 1005 to 1016

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[Construction and Application of Reclamation Reform Act of 1982, 43 U.S.C.A. ss390aa et seq., 31 A.L.R. Fed. 2d 475](#)

The United States has complete sovereignty over its internal waters¹ although it has been held that states generally own the superior right to nonnavigable water.² Upon statehood, the United States retains any title vested in it before statehood to any land beneath waters not then navigable and not tidally influenced, to be transferred or licensed if and as it chooses.³

Under the Commerce Clause of the U.S. Constitution,⁴ the federal government has the power to improve navigable waters in the interest of navigation and is not liable for damages if an improvement on a navigable stream raises the water level and thereby damages privately owned property within the bed of a stream although the government is liable for damages if such action raises the water and causes it to overflow or otherwise damage property situated outside the bed of the stream.⁵

Congressional power over federal lands includes the authority to regulate activities on nonfederal public waters in order to protect wildlife and visitors on the lands.⁶ Federal control of international streams or bodies of water within the territorial limits of the United States is not restrained by international comity.⁷

The existence of unexercised federal regulatory power does not foreclose state regulation of its water resources, of the uses of water within the state, or, indeed, of interstate commerce in water.⁸

Observation:

In response to global climate change, the United States has adopted "secure water" provisions⁹ as part of the Omnibus Public Land Management Act of 2009.¹⁰ The statute addresses the effect of global climate change to U.S. water resources and seeks to ensure adequate and safe supplies of water. The legislation establishes programs to assess specific risks to the water supply of each major reclamation river basin,¹¹ to enhance water data,¹² and to assess national water availability and use.¹³ It sets up grants, cooperative agreements, and research agreements;¹⁴ provides for the assessment of the effect of, and risk resulting from, global climate change with respect to water supplies required for the generation of hydroelectric power;¹⁵ and creates a climate change and water intragovernmental panel.¹⁶

CUMULATIVE SUPPLEMENT

Statutes:

[42 U.S.C.A. § 10371](#), added effective December 31, 2020, directs the Under Secretary of Commerce for Oceans and Atmosphere to establish a center, to be known as the National Water Center, to serve as the research and operational center of excellence for hydrologic analyses, forecasting, and related decision support services within the National Oceanic and Atmospheric Administration and the National Weather Service and to facilitate collaboration across federal and state departments and agencies, academia, and the private sector on matters relating to water resources. The Center's functions include (1) improving understanding of water resources, stakeholder needs regarding water resources, and identifying science and services gaps relating to water resources; (2) developing and implementing advanced water resources modeling capabilities; (3) facilitating the transition of hydrologic research into operations; (4) delivering analyses, forecasts, and inundation information and guidance for all hydrologic events in the United States, including flash flooding, riverine flooding, and water resources outlooks; and (5) in coordination with warning coordination meteorologists, providing decision-support services to inform emergency management and water resources decisions.

Cases:

The power of States to control water within their borders may be subject to limits in certain circumstances; for example, those imposed by the Commerce Clause. [U.S.C.A. Const. Art. 1, § 8, cl. 3. Tarrant Regional Water Dist. v. Herrmann](#), 133 S. Ct. 2120 (2013).

[END OF SUPPLEMENT]

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Footnotes

1 WesternGeco L.L.C. v. Ion Geophysical Corp., 776 F. Supp. 2d 342 (S.D. Tex. 2011).
2 Wagoner County Rural Water Dist. No. 2 v. Grand River Dam Authority, 2010 OK CIV APP 95, 241 P.3d
3 1132 (Div. 2 2010), cert. denied, 131 S. Ct. 1045, 178 L. Ed. 2d 864 (2011).
4 PPL Montana, LLC v. Montana, 132 S. Ct. 1215, 182 L. Ed. 2d 77 (2012).
5 U.S. Const. Art. I, § 8, cl. 3.
6 Goose Creek Hunting Club, Inc. v. U. S., 207 Ct. Cl. 323, 518 F.2d 579 (1975).
7 U.S. v. Brown, 552 F.2d 817 (8th Cir. 1977).
8 Minnesota Canal & Power Co. v. Pratt, 101 Minn. 197, 112 N.W. 395 (1907).
9 As to jurisdiction over international waters, generally, see Am. Jur. 2d, International Law §§ 74 to 82. As to
10 jurisdiction over vessels and ships, see Am. Jur. 2d, International Law §§ 84 to 88.
11 Sporhase v. Nebraska, ex rel. Douglas, 458 U.S. 941, 102 S. Ct. 3456, 73 L. Ed. 2d 1254 (1982).
12 42 U.S.C.A. §§ 10361 to 10370.
13 Pub. L. No. 111-11, 123 Stat. 991 (March 30, 2009).
14 42 U.S.C.A. § 10363.
15 42 U.S.C.A. § 10367.
16 42 U.S.C.A. § 10368.
17 42 U.S.C.A. §§ 10364, 10369.
18 42 U.S.C.A. § 10365.
19 42 U.S.C.A. § 10366.

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II. Water Rights, Interests, and Uses

A. In General

[Topic Summary](#) | [Correlation Table](#)

Research References

West's Key Number Digest

West's Key Number Digest, Water Law  1007 to 1023, 1227, 1255 to 1271, 1275 to 1299, 1310 to 1450.8, 1532, 1533, 1535 to 1551, 1598, 1606 to 1609, 1665 to 1696, 1700 to 1731, 2535 to 2538

A.L.R. Library

A.L.R. Index, Lakes and Ponds

A.L.R. Index, Private Waters

A.L.R. Index, Rivers and Streams

A.L.R. Index, Waters and Watercourses

West's A.L.R. Digest, Water Law  1007 to 1023, 1227, 1255 to 1271, 1275 to 1299, 1310 to 1450.8, 1532, 1533, 1535 to 1551, 1598, 1606 to 1609, 1665 to 1696, 1700 to 1731, 2535 to 2538

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78 Am. Jur. 2d Waters § 4

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Waters

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II. Water Rights, Interests, and Uses

A. In General

1. General Considerations

§ 4. Ownership of, and title to, waters

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West's Key Number Digest

West's Key Number Digest, Water Law 1007 to 1023, 2535 to 2538

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Public rights of recreational boating, fishing, wading, or the like in inland stream the bed of which is privately owned, 6
A.L.R.4th 1030

Forms

[Am. Jur. Legal Forms 2d § 260:4](#) (Form drafting guide—Checklist—Matters to be considered when drafting instrument or provision concerning water rights)

Navigable waters are generally not seen as susceptible of private ownership,¹ and the corpus of running water in a natural stream is not the subject of private ownership.² A rule of very general, although not universal, application is that the ownership of navigable waters is vested in the public or in the state in trust for the public.³ Accordingly, in some jurisdictions, sometimes by

virtue of constitutional or statutory provision, the water of every natural stream, not previously appropriated, within the state, is the property of the public, dedicated to the use of the people of the state, and subject to appropriation.⁴

The waters of nonnavigable streams on the public domain which are not appropriated by the methods cognizant to law are as much the property of the government as the lands through which they flow.⁵ The right of the United States in the navigable waters within the several states has been held to be limited to the control of them for the regulation of commerce⁶ although, upon statehood, the United States also retains any title vested in it before statehood to any land beneath waters not then navigable and not tidally influenced, to be transferred or licensed if and as it chooses.⁷ The general rule is that the United States owns a right to navigable water superior to that of the State.⁸

Observation:

The Desert Land Act of 1877⁹ recognizes the right of western states to the legislative appropriation of waters within their boundaries.¹⁰

In most jurisdictions, nonnavigable waters may be privately owned, and the rule, in the absence of any constitutional or statutory provision to the contrary, is that nonnavigable waters belong to the owner or owners of the land upon or over which they stand or flow.¹¹ It has also been held that a body of water that is navigable but not necessary for commerce may be privately owned, subject to a right of access in the public.¹² However, it has been said that there is no private right to own the waters that flow across a state; instead, a private right to use water can be acquired, and water can be owned once it is diverted for a beneficial use.¹³

The states have authority to establish for themselves such rules as they may deem expedient in respect of the ownership of the natural streams and other bodies of water, both navigable and nonnavigable, within their respective borders, subject to constitutional inhibitions against interference with vested rights or the taking of private property for public use without just compensation.¹⁴ State authority is subject also, in the case of navigable waters, to the paramount authority of the federal government to control the navigation so far as may be necessary for the regulation of interstate and foreign commerce.¹⁵

Observation:

A state does not have the right to possess and use water to the exclusion of others and has only such riparian, overlying, or appropriative rights as it may obtain by law. The State's interest, therefore, is not an ownership interest but rather a nonproprietary, regulatory one. The State's interest in the public groundwater and surface waters is to make a water policy that preserves and regulates it.¹⁶ A state has a duty to ensure the continued availability and existence of its water resources for present and future generations.¹⁷ Navigable waters and streams are reserved to the State for the use of the public generally, and no one has an exclusive right to the enjoyment of such property unless and until the legislature has granted such right.¹⁸

CUMULATIVE SUPPLEMENT

Cases:

The public trust doctrine of the state constitution applies to all water resources without exception or distinction. Const. Art. 11, § 1. [Kauai Springs, Inc. v. Planning Com'n of County of Kauai](#), 324 P.3d 951 (Haw. 2014).

State's ownership of flowing streams and natural watercourses was fixed at statehood. [N.D. Const. art. 11, § 3. Sorum v. State](#), 2020 ND 175, 947 N.W.2d 382 (N.D. 2020).

[END OF SUPPLEMENT]

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Footnotes

- 1 [U.S. v. Twin City Power Co.](#), 350 U.S. 222, 76 S. Ct. 259, 100 L. Ed. 240 (1956).
- 2 [Northport Irr. Dist. v. Jess](#), 215 Neb. 152, 337 N.W.2d 733 (1983).
- 3 [State of Oklahoma v. State of Texas](#), 258 U.S. 574, 42 S. Ct. 406, 66 L. Ed. 771 (1922).
- 4 [Chatfield East Well Co., Ltd. v. Chatfield East Property Owners Ass'n](#), 956 P.2d 1260 (Colo. 1998).
- 5 [Donnelly v. U.S.](#), 228 U.S. 243, 33 S. Ct. 449, 57 L. Ed. 820 (1913).
- 6 [Port of Seattle v. Oregon & W. R. Co.](#), 255 U.S. 56, 41 S. Ct. 237, 65 L. Ed. 500 (1921).
- 7 [PPL Montana, LLC v. Montana](#), 132 S. Ct. 1215, 182 L. Ed. 2d 77 (2012).
- 8 [Wagoner County Rural Water Dist. No. 2 v. Grand River Dam Authority](#), 2010 OK CIV APP 95, 241 P.3d 1132 (Div. 2 2010), cert. denied, 131 S. Ct. 1045, 178 L. Ed. 2d 864 (2011).
As to federal authority over navigable waters, see § 151.
43 U.S.C.A. §§ 321 to 339.
- 9 [Idaho Dept. of Water Resources v. U.S.](#), 122 Idaho 116, 832 P.2d 289 (1992), judgment rev'd on other grounds, 508 U.S. 1, 113 S. Ct. 1893, 123 L. Ed. 2d 563 (1993).
- 10 [Cinque Bambini Partnership v. State](#), 491 So. 2d 508 (Miss. 1986), judgment aff'd, 484 U.S. 469, 108 S. Ct. 791, 98 L. Ed. 2d 877 (1988); [Adirondack League Club, Inc. v. Sierra Club](#), 92 N.Y.2d 591, 684 N.Y.S.2d 168, 706 N.E.2d 1192 (1998).
As to the title to and ownership of lakes, ponds, and other natural bodies of water, see §§ 120 to 134, 152.
As to the title to and ownership of surface waters, see § 190.
As to the title to and ownership of subterranean waters, including springs and wells, see §§ 199 to 201, 221 to 223, 256 to 258.
- 11 [As to the title to and ownership of floodwaters, see §§ 290, 291.](#)
[As to the title to and ownership of artificial waterways and bodies of water, see §§ 265, 266.](#)
[The Pointe, LLC v. Lake Management Ass'n, Inc.](#), 50 S.W.3d 471 (Tenn. Ct. App. 2000).
- 12 [In re Tonko](#), 154 P.3d 397 (Colo. 2007); [In re Idaho Dept. of Water Resources Amended Final Order Creating Water Dist. No. 170](#), 148 Idaho 200, 220 P.3d 318 (2009); [Hydro Resources Corp. v. Gray](#), 2007-NMSC-061, 143 N.M. 142, 173 P.3d 749 (2007); [Melville v. Salt Lake County](#), 570 P.2d 687 (Utah 1977); [Lummi Indian Nation v. State](#), 170 Wash. 2d 247, 241 P.3d 1220 (2010).

14 [State of Ark. v. State of Tenn.](#), 246 U.S. 158, 38 S. Ct. 301, 62 L. Ed. 638 (1918); [U.S. v. Cress](#), 243 U.S. 316, 37 S. Ct. 380, 61 L. Ed. 746 (1917).
15 Irrespective of the ownership of the bed of a stream or of land upon or over which waters flow, the State's right to control and use its own waters as it sees fit is paramount except as it may be shown that the title of the federal government to such waters was encumbered when that title passed from the federal government to the State upon its admission to the Union. [Day v. Armstrong](#), 362 P.2d 137 (Wyo. 1961).
16 § 151.
17 [City of Barstow v. Mojave Water Agency](#), 23 Cal. 4th 1224, 99 Cal. Rptr. 2d 294, 5 P.3d 853 (2000).
18 [In re Water Use Permit Applications](#), 94 Haw. 97, 9 P.3d 409 (2000).
 [TH Investments, Inc. v. Kirby Inland Marine, L.P.](#), 218 S.W.3d 173 (Tex. App. Houston 14th Dist. 2007).

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78 Am. Jur. 2d Waters § 5

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II. Water Rights, Interests, and Uses

A. In General

1. General Considerations

§ 5. Ownership of, and title to, waters— Relinquishment or alienation of public ownership or title

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, Water Law  1007 to 1023, 2535 to 2538

The State's ownership of the natural streams and other bodies of water in trust for the public cannot be abandoned, relinquished, or alienated except for some public purpose or some reasonable use which can fairly be said to be for a public benefit.¹ In some states, the "public trust doctrine" prohibits the State from disposing of its interest in the waters of the state in such a way that the public's right of access is substantially impaired unless the action promotes the overall interests of the public.² According to the public trust doctrine, the State holds state shorelines and waters in trust for the people of the state, and the State can no more convey or give away this interest than it can abdicate its police powers in the administration of government and the preservation of the peace.³ The public trust doctrine prohibits a state from completely abdicating its interest in navigable waters to private parties in order to preserve important public interests such as commerce, transportation, recreation, and other rights.⁴

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Footnotes

¹ *Shively v. Bowlby*, 152 U.S. 1, 14 S. Ct. 548, 38 L. Ed. 331 (1894); *Illinois Cent. R. Co. v. State of Illinois*, 146 U.S. 387, 13 S. Ct. 110, 36 L. Ed. 1018 (1892).

Rights to free passage over a foreshore are not capable of conveyance and extinction by transactions such as a lease of shoreline property from a town to a private individual but on the contrary remain in the town in its sovereign capacity and in the public at large. *U.S. v. Kane*, 461 F. Supp. 554 (E.D. N.Y. 1978).

² *Rettkowski v. Department of Ecology*, 122 Wash. 2d 219, 858 P.2d 232 (1993).

³ *Lake Union Drydock Co., Inc. v. State Dept. of Natural Resources*, 143 Wash. App. 644, 179 P.3d 844 (Div. 2 2008).

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II. Water Rights, Interests, and Uses

A. In General

1. General Considerations

§ 6. Definition and nature of water rights

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, Water Law  1007 to 1023, 2535 to 2538

Forms

- [Am. Jur. Legal Forms 2d §§ 153:12 to 153:18](#) (Contracts and leases pertaining to irrigation)
- [Am. Jur. Legal Forms 2d §§ 153:21 to 153:24](#) (Lease provisions pertaining to irrigation)
- [Am. Jur. Legal Forms 2d §§ 153:43 to 153:69](#) (Provisions in irrigation district contracts with water users)
- [Am. Jur. Legal Forms 2d § 260:4](#) (Form drafting guide—Checklist—Matters to be considered when drafting instrument or provision concerning water rights)
- [Am. Jur. Legal Forms 2d § 260:5](#) (Form drafting guide—Checklist—Matters to be considered when drafting deed of land and water rights)
- [Am. Jur. Legal Forms 2d § 260:8](#) (Agreement to furnish water)
- [Am. Jur. Pleading and Practice Forms, Irrigation § 18](#) (Checklist—Drafting a complaint in action for breach of contract to furnish irrigation water)
- [Am. Jur. Pleading and Practice Forms, Irrigation §§ 19 to 24](#) (Complaints, petitions, and declarations in irrigation causes of action)

A "water right" is a vested right or appropriation right under which a person may lawfully divert and use water.¹ The term is frequently used to describe a mere usufructuary right or interest in a stream or other body of water or the right to the use of

another's premises for the conveyance of water.² Water rights are determined under state law, not federal law.³ The term "water rights" has acquired a local significance in regions where irrigation is common.⁴

A water right is a property right⁵ and is considered real property.⁶ When the land is conveyed, the water right passes with it,⁷ and a water right is subject to establishment and loss pursuant to the doctrines of prescription, adverse possession, and abandonment.⁸

Caution:

Although it is held that when land is conveyed, the water right passes with it,⁹ it has also been held that a water right is not an automatic stick in the bundle of rights a landowner receives upon purchasing even a fee interest in land. Rather, water rights must be acquired by appropriation to beneficial use or by purchase and transfer. A need for water rights does not establish ownership of those rights just as it does not result in water rights becoming appurtenant to land.¹⁰

In some states, a water right does not have all the attributes of a real property interest in that a water right may be conveyed without a complete legal description and may be lost through nonuse.¹¹

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Footnotes

1 Frick Farm Properties, L.P. v. State, Dept. of Agr., Div. of Water Resources, 40 Kan. App. 2d 132, 190 P.3d 983 (2008), decision aff'd, 289 Kan. 690, 216 P.3d 170 (2009).

As to estoppel by failure to disclose title or interest in rights to real property, see Am. Jur. 2d, Estoppel and Waiver §§ 91 to 99.

2 Smith v. Denniff, 23 Mont. 65, 57 P. 557 (1899), rev'd on other grounds, 24 Mont. 20, 60 P. 398 (1900).

3 Hydro Resources Corp. v. Gray, 2007-NMSC-061, 143 N.M. 142, 173 P.3d 749 (2007).

4 Union Falls Power Co. v. Marinette County, 238 Wis. 134, 298 N.W. 598, 134 A.L.R. 958 (1941).

Generally, as to riparian owners with regard to irrigation, see Am. Jur. 2d, Irrigation §§ 9 to 15.

5 Bayou Land Co. v. Talley, 924 P.2d 136 (Colo. 1996).

6 New Mexico v. General Elec. Co., 335 F. Supp. 2d 1185 (D.N.M. 2004) (applying New Mexico law); Clear Springs Foods, Inc. v. Spackman, 150 Idaho 790, 252 P.3d 71 (2011); Foster v. Sunnyside Valley Irr. Dist., 102 Wash. 2d 395, 687 P.2d 841 (1984).

7 Bentley v. Director of Office of State Lands and Investments, 2007 WY 94, 160 P.3d 1109 (Wyo. 2007).

8 North Kern Water Storage Dist. v. Kern Delta Water Dist., 147 Cal. App. 4th 555, 54 Cal. Rptr. 3d 578 (5th Dist. 2007).

As to loss, abandonment, or termination of water rights, see § 12.

9 Bentley v. Director of Office of State Lands and Investments, 2007 WY 94, 160 P.3d 1109 (Wyo. 2007).

10 Hydro Resources Corp. v. Gray, 2007-NMSC-061, 143 N.M. 142, 173 P.3d 749 (2007).

11 Crow v. Carlson, 107 Idaho 461, 690 P.2d 916 (1984).

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II. Water Rights, Interests, and Uses

A. In General

1. General Considerations

§ 7. Definition and nature of water rights and privileges—As appurtenant or in gross

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, Water Law 1007 to 1023

A water right or easement may be in gross or may be appurtenant to some other property or right, depending mainly upon the nature of the right and the intention of the parties creating it.¹ Easements in gross are not favored, however, and a water right or easement will ordinarily be presumed not to be in gross where it can fairly be construed to be appurtenant to some other estate.² A water right is generally appurtenant to and severable from the land on or in connection with which the water is used, and such water right passes as an appurtenance with a conveyance of the land by deed, lease, mortgage, will, or other voluntary disposal or by inheritance.³ It has been said that water rights severed from the land assume the nature of an easement in gross.⁴

Distinction:

The primary distinction between the two types of easement is that in an easement in gross, there is no dominant estate to which the easement is attached so that the easement is a personal right; and in an easement appurtenant, there is a dominant estate that is benefited by the easement, and the easement runs with the land.⁵

Water rights are generally appurtenant to the land on which the water is beneficially used.⁶ Because water rights are considered appurtenant to the land, they are presumed transferred with the land absent an express reservation.⁷ In the absence of an express grant of water rights, a conveyance will only include water rights if they are appurtenant to the land.⁸ The determination of whether water is appurtenant to the land is one of fact.⁹ Inchoate water rights are not appurtenant to the land.¹⁰

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Footnotes

1 Chase v. Cram, 39 R.I. 83, 97 A. 481 (1916), modified on other grounds, 97 A. 802 (R.I. 1916); Cadwalader v. Bailey, 17 R.I. 495, 23 A. 20 (1891).
As to easements in general as appurtenant or in gross, see Am. Jur. 2d, Easements and Licenses §§ 8 to 10.
2 Bradley v. Jackson County, 347 S.W.2d 683 (Mo. 1961).
3 Frick Farm Properties, L.P. v. State, Dept. of Agriculture, Div. of Water Resources, 289 Kan. 690, 216 P.3d 170 (2009).
4 Maclay v. Missoula Irr. Dist., 90 Mont. 344, 3 P.2d 286 (1931).
5 Am. Jur. 2d, Easements and Licenses §§ 8, 9.
6 Axtell v. M.S. Consulting, 1998 MT 64, 288 Mont. 150, 955 P.2d 1362 (1998); Salt Lake City v. Silver Fork Pipeline Corp., 2000 UT 3, 5 P.3d 1206 (Utah 2000); Bentley v. Director of Office of State Lands and Investments, 2007 WY 94, 160 P.3d 1109 (Wyo. 2007).
Water rights are appurtenant to the benefited land whether the water rights are acquired by statute or common law. Dermody v. City of Reno, 113 Nev. 207, 931 P.2d 1354 (1997).
7 Nicoll v. Rudnick, 160 Cal. App. 4th 550, 72 Cal. Rptr. 3d 879 (5th Dist. 2008).
8 Roybal v. Lujan de la Fuente, 147 N.M. 193, 2009-NMCA-114, 218 P.3d 879 (Ct. App. 2009).
9 Department of State Lands v. Pettibone, 216 Mont. 361, 702 P.2d 948, 26 Ed. Law Rep. 823 (1985).
10 Loosle v. First Federal Sav. & Loan Ass'n of Logan, 858 P.2d 999 (Utah 1993).

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II. Water Rights, Interests, and Uses

A. In General

1. General Considerations

§ 8. Rights as to artificial conditions

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, Water Law  1017 to 1023, 1255 to 1271

Forms

[Am. Jur. Pleading and Practice Forms, Waters § 266](#) (Complaint, petition, or declaration—Obstruction of artificial drainage
—By landfill—Prescriptive drainage easement)

As between individuals, there seems to be no doubt that rights may be acquired in an artificial condition of a body of water in the same way that they can be acquired in real property in general, and this may be by contract; by grant, either express or implied; by prescription; and by dedication.¹

If several persons contract expressly, or so act that from their conduct a contract will be implied, for the creation, maintenance, or use of an artificial condition of a body of water, this contract will be enforced as far as it can be consistent with the rules of law.²

According to some authorities, a change in the natural condition of a stream or other body of water may, under some circumstances, operate to substitute the artificial for the natural condition, so as to invest persons who have acquiesced in or acted upon such change with a right to the continuance of such artificial condition,³ but other authorities hold that there can be no prescriptive right to the continuance of an artificial condition created and maintained by another for that person's own benefit.⁴ Rights in respect to the artificial condition may depend upon the character of the condition as permanent or temporary, and no

such right accrues where the structure by which the artificial condition is effected gives indication that it is for a temporary purpose or for a purpose that may at any time be abandoned.⁵

An artificial condition of a stream or other body of water may become a natural or normal condition as respects public rights.⁶ It has been stated, however, in this connection, that it usually requires conduct amounting to dedication or abandonment to give the public rights in an artificial condition of a body of water created by private enterprise for the reason that the public right in a stream is ordinarily measured by the condition of the stream in its natural state.⁷

Practice Tip:

Flowage rights may include the right to operate a dam and flood upstream land⁸ and may also include an easement that arises from the natural or long-existing rate of flowing water away from the upstream property over to the downstream properties.⁹ The mere fact that the exercise of a right of flowage easement in connection with the erection of a dam is of advantage to the owner of a servient estate gives the servient estate's owner no right to insist on the exercise of the easement on the part of the dominant owner. As an easement exists for the benefit of the dominant estate alone, the servient owner acquires no right to insist on its continuance or to ask for damages on its abandonment, and thus, the owner of the dominant estate may raise or lower the water level between the natural low-water mark and the easement high-water mark.¹⁰

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Footnotes

- 1 [Village of Pewaukee v. Savoy, 103 Wis. 271, 79 N.W. 436 \(1899\)](#).
As to rights of, or as between, riparian proprietors in respect to the continuance of artificial conditions, see [§ 45](#).
As to restoration of an altered stream to its original channel or condition, see [§ 96](#).
As to removal of dams, see [§ 270](#).
As to discontinuance of a project for the diversion of water, see [§ 67](#).
As to rights in respect to altered conditions of natural lakes or ponds, see [§ 133](#).
- 2 [Case v. Hoffman, 100 Wis. 314, 72 N.W. 390 \(1897\)](#), modified on other grounds on reh'g, 100 Wis. 314, 75 N.W. 945 (1898).
- 3 [Kray v. Muggli, 84 Minn. 90, 86 N.W. 882 \(1901\)](#).
The artificial state or condition of flowing water, founded upon prescription, becomes a substitute for the natural condition previously existing, and from it arises a right on the part of those interested to have the new condition maintained. [Smith v. Youmans, 96 Wis. 103, 70 N.W. 1115 \(1897\)](#).
- 4 [Mitchell Drainage Dist. v. Farmers' Irr. Dist., 127 Neb. 484, 256 N.W. 15 \(1934\)](#).
- 5 [Lake Drummond Canal & Water Co. v. Burnham, 147 N.C. 41, 60 S.E. 650 \(1908\)](#).
- 6 [Tapoco, Inc. v. Peterson, 213 Tenn. 335, 373 S.W.2d 605 \(1963\)](#); [Diversion Lake Club v. Heath, 126 Tex. 129, 86 S.W.2d 441 \(1935\)](#).
As to the right of navigation of waters made navigable, improved, or changed by riparian proprietor, see [§ 168](#).
- 7 [Tapoco, Inc. v. Peterson, 213 Tenn. 335, 373 S.W.2d 605 \(1963\)](#).

⁸ *Town of Waltham v. PPL Maine, LLC*, 2006 ME 88, 901 A.2d 816 (Me. 2006).

As to flowage, generally, see §§ 271 to 275.

⁹ Terlecki v. Stewart, 278 Mich. App. 644, 754 N.W.2d 899 (2008).

¹⁰ Terlecki v. Stewart, 278 Mich. App. 644, 754 N.W.2d 899 (2008).

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A. In General

1. General Considerations

§ 9. Rights as to artificially developed, conserved, or augmented waters

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, Water Law  1017 to 1023, 1255 to 1271

The view has been taken that persons who by their own exertions have developed a supply of water previously not a part of the waters of a stream and not before available to the users of the stream have the first right to take and use such increase, and in such a case, the general rule of priority does not apply to the amount developed.¹ Thus, if a large amount of water is naturally lost by absorption and evaporation in passing through its natural channel from the lands of an upper riparian owner to those of the lower owner, the upper owner may provide artificial means for saving that water and carrying the remainder of the water of the stream in excess of the amount saved to the lands of the lower owner, and the upper owner may retain for the upper owner's own use so much of the water thus otherwise lost as the upper owner can save by artificial means.² According to some authorities, however, the rule that a person is entitled to waters which the person develops in a stream does not apply to cases of mere removal of obstructions or hastening of flow, so that the actual amount of water which passes along the stream is not increased, but only to cases in which a supply of water is added to the stream which otherwise would not have flowed there.³

Under the doctrine of prior appropriation,⁴ where water is intentionally emptied into a natural watercourse for conduction to another point, an equivalent or proportional amount may be recaptured or diverted at such latter point.⁵

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Footnotes

¹ [Smith v. Duff](#), 39 Mont. 382, 102 P. 984 (1909).

As to rights in respect of streams or bodies of water which are wholly artificial, see §§ 265, 266.

² [Wiggins v. Muscupiabe Land & Water Co.](#), 113 Cal. 182, 45 P. 160 (1896).

³ Smith v. Duff, 39 Mont. 382, 102 P. 984 (1909).

⁴ As to the doctrine of prior appropriation in general, see §§ 355 to 382.

⁵ Rock Creek Ditch & Flume Co. v. Miller, 93 Mont. 248, 17 P.2d 1074, 89 A.L.R. 200 (1933).

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§ 10. Rights under public land grants

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, Water Law  1007 to 1012, 1227

The general rule is that in the absence of any express provision on the subject, water rights under public land grants depend upon local law.¹ Under the law of some jurisdictions, such a conveyance confers no riparian rights.² In government patents containing no words showing a purpose to define riparian rights, the intention to abide by the state law is inferred.³ Where riparian rights exist,⁴ they attach at the very inception of title so that where one secures a patent of government land, the person's rights as a riparian owner attach as of the date when the person settled on the land.⁵ Under existing federal statutes, grants of public lands carry no water rights, the waters thereon being appropriable, subject to previously acquired and existing rights.⁶

A state which is the absolute owner of the tidelands within its boundaries and of the waters over them is free, in conveying such lands, either to grant with them rights in the adjoining water area or to completely withhold such rights.⁷

The grantee of government land through which streams had been changed while in the government's possession takes subject to such changed conditions.⁸

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Footnotes

¹ *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 55 S. Ct. 725, 79 L. Ed. 1356 (1935); *Port of Seattle v. Oregon & W. R. Co.*, 255 U.S. 56, 41 S. Ct. 237, 65 L. Ed. 500 (1921) (law of State of Washington).

As to power of Congress with regard to waters on federal public lands, see [Am. Jur. 2d, Public Lands § 7](#).

2 Port of Seattle v. Oregon & W. R. Co., 255 U.S. 56, 41 S. Ct. 237, 65 L. Ed. 500 (1921).
3 Brewer-Elliott Oil & Gas Co. v. U.S., 260 U.S. 77, 43 S. Ct. 60, 67 L. Ed. 140 (1922).
4 As to recognition of rights, see § 34.
5 Benton v. Johncox, 17 Wash. 277, 49 P. 495 (1897).
6 California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 55 S. Ct. 725, 79 L. Ed. 1356
(1935).
7 Port of Seattle v. Oregon & W. R. Co., 255 U.S. 56, 41 S. Ct. 237, 65 L. Ed. 500 (1921).
8 Isaacs v. Barber, 10 Wash. 124, 38 P. 871 (1894).

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§ 11. Interference with, or injury to, rights

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, Water Law  1310 to 1450.8, 2535 to 2538

Forms

[Am. Jur. Pleading and Practice Forms, Irrigation § 18](#) (Checklist—Drafting a complaint in action for breach of contract to furnish irrigation water)

[Am. Jur. Pleading and Practice Forms, Irrigation §§ 19 to 24](#) (Complaints, petitions, and declarations in irrigation causes of action)

[Am. Jur. Pleading and Practice Forms, Waters §§ 3 to 8, 27 to 35, 58.50 to 67](#) (Complaints, petitions and declarations in causes of action based upon private water rights)

Any wrongful and direct interference with the rights of another in the possession of water rights constitutes a trespass¹ or tort.² A wrongful interference with rights in respect to waters may also constitute a nuisance.³ The fact that an interference with water rights may have been necessary in order to enable a public service corporation to perform its duties to the public does not render it immune from liability for the damage resulting from such interference.⁴

Interference with support provided by water is not subject to the same rules of absolute liability that are imposed on a landowner who deprives a neighbor of the natural support provided by soil or other more solid materials.⁵

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Footnotes

1 Fall River Valley Irr. Dist. v. Mt. Shasta Power Corp., 202 Cal. 56, 259 P. 444, 56 A.L.R. 264 (1927);
McNabb v. Houser, 171 Ga. 744, 156 S.E. 595, 74 A.L.R. 1122 (1931).

2 Collens v. New Canaan Water Co., 155 Conn. 477, 234 A.2d 825 (1967).

3 § 409.

As to interference with natural bodies of water, see § 133.

As to interference with rights in respect to drainage of surface waters, see §§ 191 to 216.

4 Taylor v. Indiana & Michigan Elec. Co., 184 Mich. 578, 151 N.W. 739 (1915).

5 Finley v. Teeter Stone, Inc., 251 Md. 428, 248 A.2d 106 (1968).

As to lateral and subjacent support for adjoining land and buildings, see *Am. Jur. 2d, Adjoining Landowners*
§§ 44 to 81.

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§ 12. Loss, abandonment, or termination of rights

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, Water Law 1606 to 1609

A.L.R. Library

[Loss of private easement by nonuse, 62 A.L.R.5th 219](#)

Forms

[Am. Jur. Pleading and Practice Forms, Waters § 43](#) (Answer—Defense—Abandonment of water right by plaintiff)

[Am. Jur. Pleading and Practice Forms, Waters § 48](#) (Finding of fact—Partial abandonment of water right)

A water right may be abandoned either expressly or by inference¹ and either wholly or partially.² Accordingly, once a person acquires a water right, either through appropriation or transfer, the person must continue to use the water right for a beneficial purpose or risk losing the water right through abandonment.³

The abandonment of water rights requires both the clearly expressed intent to abandon and the actual surrender or relinquishment of the water rights.⁴ A water rights owner can avoid the common-law abandonment that arises after a protracted period of nonuse by establishing the absence of intent to abandon the water right.⁵ Mere nonuse does not ordinarily constitute an abandonment, in the absence of circumstances evidencing an intention that it should have such effect⁶ or a statute providing for forfeiture of the right for nonuse.⁷ When no limitation is set out in the terms of an easement or grant, either in years or upon a happening of a particular event or contingency, the easement is permanent in nature and will continue in operation forever, unless abandoned by nonuse, particularly where words of inheritance are used.⁸

A breach of the conditions of a grant of a water privilege by the grantee may render it subject to cancellation.⁹ Further, rights in a stream may be lost by adverse use by another for the prescriptive period.¹⁰

CUMULATIVE SUPPLEMENT

Cases:

Once an appropriator abandons a water right, the right ceases. [Marks v. 71 Ranch, LP](#), 2014 MT 250, 334 P.3d 373 (Mont. 2014).

Under statute governing forfeiture of water rights, in conjunction with statute codifying the principle of beneficial use, a water right may be forfeited either in whole or in part, even under version of forfeiture statute before it was amended to specifically authorize partial forfeiture. West's [U.C.A. §§ 73-1-3, 73-1-4](#). [Delta Canal Co. v. Frank Vincent Family Ranch, LC](#), 2013 UT 54, 321 P.3d 1027 (Utah 2013).

[END OF SUPPLEMENT]

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Footnotes

- 1 [City of San Marcos v. Texas Com'n on Environmental Quality](#), 128 S.W.3d 264 (Tex. App. Austin 2004).
As to the loss or abandonment of riparian rights, see § 54.
As to the loss or abandonment of a right of prior appropriation, see § 373.
As to the loss or abandonment of a right to water for irrigation, see [Am. Jur. 2d, Irrigation](#) § 7.
- 2 [City of Anson v. Arnett](#), 250 S.W.2d 450 (Tex. Civ. App. Eastland 1952), writ refused n.r.e.
- 3 [Romero v. Bernell](#), 603 F. Supp. 2d 1333 (D.N.M. 2009) (applying New Mexico law); [Axtell v. M.S. Consulting](#), 1998 MT 64, 288 Mont. 150, 955 P.2d 1362 (1998).
The lack of mill activity on a property for at least 76 years constituted abandonment of a mill privilege. [Brentwood Volunteer Fireman's Ass'n v. Musso](#), 159 N.H. 461, 986 A.2d 588 (2009).
- 4 [Joyce Livestock Co. v. U.S.](#), 144 Idaho 1, 156 P.3d 502 (2007).
- 5 [State ex rel. Office of State Engineer v. Elephant Butte Irr. Dist.](#), 2012-NMCA-090, 287 P.3d 324 (N.M. Ct. App. 2012), cert. denied, 2012-NMCERT-008 (N.M. 2012).
- 6 [Fruit Growers' Ditch & Reservoir Co. v. Donald](#), 96 Colo. 264, 41 P.2d 516, 98 A.L.R. 1288 (1935).
- 7 [In re Drainage Area of Bear River in Rich County](#), 12 Utah 2d 1, 361 P.2d 407 (1961) (statute providing for forfeiture of water right by nonuse for five years).
Under statute, if a water permit holder cannot establish either lawful and beneficial use, or excused nonuse, for one of five successive years, those water rights terminate by operation of law regardless of the holder's intent. [Hawley v. Kansas Dept. of Agriculture](#), 281 Kan. 603, 132 P.3d 870 (2006).
- 8 [Steele v. Pfeifer](#), 310 N.W.2d 782 (S.D. 1981) (use of a water well).
- 9 [Public Service Commission of Puerto Rico v. Havemeyer](#), 296 U.S. 506, 56 S. Ct. 360, 80 L. Ed. 357 (1936).

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[Mathewson v. Hoffman, 77 Mich. 420, 43 N.W. 879 \(1889\).](#)

As to acquisition of rights by prescription, see §§ [382](#) to [394](#).

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78 Am. Jur. 2d Waters § 13

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Waters

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II. Water Rights, Interests, and Uses

A. In General

2. Reserved Water Rights Doctrine

§ 13. Generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Water Law](#) 1700 to 1731

The doctrine of federal reserved water rights represents a limited exception to the general rule that individual states govern water rights within their respective borders.¹ Under the doctrine, when the United States withdraws lands from the public domain and reserves them for a federal purpose, the United States implicitly reserves appurtenant waters then unappropriated to the extent needed to accomplish the purpose of the reservation.² Federal reserved water rights do not derive from actual use; instead, they are tied to the stated intent or purpose of the reservation of land for a federal purpose.³

Federal reserved water rights exist independently of state law.⁴ Unlike a state water right, the priority of a federal reserved water right is not established by appropriation for beneficial use; rather, such a right is determined by the withdrawal and reservation of the applicable land for a federal purpose.⁵

The amount of water reserved under the reserved water rights doctrine is limited to what is necessary to fulfill the purposes of the land reservation.⁶ A federal reserved right to groundwater may only be found where other waters are inadequate to accomplish the purpose of a reservation.⁷

Federal reserved water rights, by their nature, exist from the time that the legislative or executive action created the federal enclave to which the water right attaches.⁸ Federal reserved water rights are by nature a preserve intended to continue through the years.⁹

CUMULATIVE SUPPLEMENT

Cases:

As the volume and scope of particular reserved water rights are federal questions, there is no need for a state adjudication to occur before federal reserved rights are recognized. [Baley v. United States, 942 F.3d 1312 \(Fed. Cir. 2019\)](#).

[END OF SUPPLEMENT]

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Footnotes

- 1 State of N.M. ex rel. State Engineer v. Commissioner of Public Lands, 145 N.M. 433, 2009-NMCA-004, 200 P.3d 86, 241 Ed. Law Rep. 409 (Ct. App. 2008).
- 2 State of Alaska v. Babbitt, 72 F.3d 698 (9th Cir. 1995), adhered to, [247 F.3d 1032 \(9th Cir. 2001\)](#); [Shoshone Bannock Tribes v. Reno, 56 F.3d 1476 \(D.C. Cir. 1995\)](#).
- 3 In re Application for Water Rights of U.S., 101 P.3d 1072 (Colo. 2004).
- 4 In re Application for Water Rights of U.S., 101 P.3d 1072 (Colo. 2004).
- 5 State of N.M. ex rel. State Engineer v. Commissioner of Public Lands, 145 N.M. 433, 2009-NMCA-004, 200 P.3d 86, 241 Ed. Law Rep. 409 (Ct. App. 2008).
- 6 Totemoff v. State, 905 P.2d 954 (Alaska 1995).
- 7 In re General Adjudication of All Rights to Use Water in Gila River System and Source, 195 Ariz. 411, 989 P.2d 739 (1999).
- 8 Navajo Development Co., Inc. v. Sanderson, 655 P.2d 1374 (Colo. 1982).
- 9 In re General Adjudication of All Rights to Use Water in Gila River System and Source, 195 Ariz. 411, 989 P.2d 739 (1999).

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II. Water Rights, Interests, and Uses

A. In General

2. Reserved Water Rights Doctrine

§ 14. By implication

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Water Law](#) 1702, 1704

Where Congress does not expressly reserve water rights in connection with the reservation of land for federal use, an intent to reserve unappropriated water is inferred if the previously unappropriated waters are necessary to accomplish the purposes for which the reservation was created.¹ However, a reservation of water may be implied under the federal reserve water rights doctrine only where the water is necessary for the primary purpose of the federal reservation.²

Observation:

The United States cannot claim by default that an implied reservation of water rights exists when it cannot be inferred there was an intent to reserve federal water rights at the creation of a reservation of public lands.³

1 U.S. v. City of Challis, 133 Idaho 525, 988 P.2d 1199 (1999).
2 Totemoff v. State, 905 P.2d 954 (Alaska 1995).
3 U.S. v. State, 135 Idaho 655, 23 P.3d 117 (2001), as amended on other grounds, (May 1, 2001).

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II. Water Rights, Interests, and Uses

A. In General

2. Reserved Water Rights Doctrine

§ 15. Scope and nature of right

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, Water Law  1718

The reserved water rights doctrine only grants to the government the right to either exclude others from appropriating water which feeds a government reservation or to use a limited volume of water in order to serve the federal land reserved as the doctrine does not provide the federal government with plenary power over a body of water.¹ Once a federal reserved water right to groundwater is established, the holder of the right may invoke federal law to protect its groundwater from subsequent diversion to the extent such protection is necessary to fulfill its reserved right even if the holder will enjoy greater protection than holders of state law water rights.²

When the federal government withdraws its land from the public domain and reserves it for a federal purpose, the government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. In so doing, the United States acquires a reserved present perfected right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators.³

Observation:

Federal reserved water rights law declines to differentiate surface and groundwater, and recognizes them as integral parts of a hydrologic cycle, when addressing the diversion of protected waters.⁴

The federal doctrine of reserved water rights vests the United States with a dormant and indefinite right that may not coincide with water uses sanctioned by state law.⁵ While federal reserved waters are not dependent on state appropriation law for their existence, if Congress or the President wishes to obtain more water for federal lands after the initial reservations, they must use the state appropriation machinery or condemn the desired water.⁶

In determining the scope of implied reserved water rights, a court may look only to the primary purpose of the reservation at the time the land was first reserved by the federal government and may not consider other purposes later given to the reservation.⁷ The extent of the federal government's express reserved water rights for public springs and waterholes is determined from the reserving documents.⁸

The federal reserved water rights doctrine or implied reservation doctrine applies not only to Indian reservations but also to other federal enclaves, such as national parks, forests, monuments, military bases, and wildlife preserves.⁹

CUMULATIVE SUPPLEMENT

Cases:

The reserved-water-rights doctrine provides that when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. [Sturgeon v. Frost, 139 S. Ct. 1066 \(2019\)](#).

The "reserved water rights doctrine" specifies that when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. [Sturgeon v. Frost, 136 S. Ct. 1061 \(2016\)](#).

[END OF SUPPLEMENT]

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Footnotes

- 1 [Totemoff v. State, 905 P.2d 954 \(Alaska 1995\)](#).
- 2 [In re General Adjudication of All Rights to Use Water in Gila River System and Source, 195 Ariz. 411, 989 P.2d 739 \(1999\)](#).
- 3 [High Country Citizens' Alliance v. Norton, 448 F. Supp. 2d 1235 \(D. Colo. 2006\)](#).
- 4 [In re General Adjudication of All Rights to Use Water in Gila River System and Source, 195 Ariz. 411, 989 P.2d 739 \(1999\)](#).
- 5 [U.S. v. Jesse, 744 P.2d 491 \(Colo. 1987\)](#).
- 6 [Navajo Development Co., Inc. v. Sanderson, 655 P.2d 1374 \(Colo. 1982\)](#).
- 7 [Totemoff v. State, 905 P.2d 954 \(Alaska 1995\)](#).
- 8 [U.S. v. City and County of Denver, By and Through Bd. of Water Com'rs, 656 P.2d 1 \(Colo. 1982\)](#).

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[In re General Adjudication of All Rights to Use Water in Gila River System and Source, 195 Ariz. 411, 989 P.2d 739 \(1999\).](#)

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II. Water Rights, Interests, and Uses

A. In General

2. Reserved Water Rights Doctrine

§ 16. Determination of existence of right

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, Water Law 1700 to 1731

The existence or absence of a reserved water right in a federal reservation of public land is a matter of federal law.¹ To determine whether the federal government impliedly reserved water rights, the court must:

- (1) examine the documents reserving the land from the public domain and the underlying legislation authorizing the reservation,
- (2) determine the precise federal purposes to be served by such legislation,
- (3) determine whether water is essential for the primary purposes of the reservation, and finally,
- (4) determine the precise quantity of water to meet the minimal need required for such purposes.²

A claimant must establish two elements in order to demonstrate the existence of a federal reserved water right: (1) that the federal government withdrew the land from the public domain and reserved it for a federal purpose and (2) that a certain amount of water is necessary to accomplish the purpose for reserving the land.³ The courts must consider the relevant acts, enabling legislation, and history surrounding a particular reservation under a review to determine if a federal reserved water right exists where the reservation of public land for a particular purpose does not expressly declare that water is needed as a primary use to accomplish the purpose of the reservation, or the exact purpose of the reservation is not clearly set forth in terms readily demonstrating the necessity for the use of water.⁴

Footnotes

- 1 U.S. v. State, 135 Idaho 655, 23 P.3d 117 (2001), as amended on other grounds, (May 1, 2001).
- 2 In re General Adjudication of All Rights to Use Water In Gila River System and Source, 231 Ariz. 8, 289 P.3d 936 (2012).
- 3 State of N.M. ex rel. State Engineer v. Commissioner of Public Lands, 145 N.M. 433, 2009-NMCA-004, 200 P.3d 86, 241 Ed. Law Rep. 409 (Ct. App. 2008).
- 4 U.S. v. State, 131 Idaho 468, 959 P.2d 449 (1998).

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II. Water Rights, Interests, and Uses

A. In General

3. Transfer

§ 17. Generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, Water Law  1275 to 1299, 1598

Forms

[Am. Jur. Legal Forms 2d § 86:40](#) (Reservation—Riparian rights)

[Am. Jur. Legal Forms 2d § 260:5](#) (Form drafting guide—Checklist—Matters to be considered when drafting deed of land and water rights)

[Am. Jur. Legal Forms 2d § 260:6](#) (Deed—Granting water rights)

[Am. Jur. Legal Forms 2d § 260:7](#) (Deed—Granting water and land rights)

A water right is a separate, protected property right that can be sold, leased, or transferred.¹ Water rights are transferred by deed in substantially the same manner as other real property,² and the conveyance of a water right requires that the same formalities be observed as in the conveyance of other types of real property.³

Whether a water right is transferable, and the mode of transfer, depends upon the nature of the particular right and also, where the right is created by a written instrument, upon any specific provisions thereof in this regard.⁴ Ordinarily, in the absence of any express restriction, one having an original right to divert and use water from a stream or body may transfer such right to another, subject to the existing rights of other persons.⁵ While derivative rights, such as easements in gross and licenses, have

frequently been held not to be assignable in the absence of any provision for them,⁶ they have also been held in some instances to be assignable.⁷ Water rights have also been held in some cases to be divisible or transferable in part.⁸

A reservation of the right to use water in a particular manner, for the accommodation of land which remains vested in the grantor, is an assignable interest although the right is reserved to the grantor without words of inheritance and without naming the grantor's assigns.⁹ In some instances, however, a reserved right is personal and nonassignable.¹⁰

The property right of an appropriator to the flow and use of the water may be sold and transferred either in whole¹¹ or in part.¹² The transfer may be for a different place of use,¹³ or for a different purpose,¹⁴ provided the change will not injuriously affect the rights of other appropriators.¹⁵

A legislature may enact a statute governing transfers of groundwater off overlying land, and such statutes provide exceptions from a common-law prohibition against such transfers.¹⁶ However, a reciprocity requirement of a state statutory restriction on the withdrawal of groundwater from any well within the state intended for use in an adjoining state violates the Commerce Clause¹⁷ by imposing an impermissible burden on interstate commerce in that the reciprocity provision, pursuant to which a permit would be granted if the State in which the water was to be used granted reciprocal rights to withdraw and transport groundwater from that state for use in the first state, operated as an explicit barrier to commerce between the first state and adjoining states.¹⁸

CUMULATIVE SUPPLEMENT

Cases:

Where a particular quantity of water is specified in a land sale deed, the presumption is that the seller retains any water it owns in excess of that quantity. *Skelton Ranch, Inc. v. Pondera County Canal & Reservoir Co.*, 2014 MT 167, 328 P.3d 644 (Mont. 2014).

[END OF SUPPLEMENT]

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Footnotes

1 Dallas Creek Water Co. v. Huey, 933 P.2d 27 (Colo. 1997); *Walker v. U.S.*, 2007-NMSC-038, 142 N.M. 45, 162 P.3d 882 (2007).

2 *Neal v. Hunt*, 112 Ariz. 307, 541 P.2d 559 (1975) (mere bill of sale not sufficient); *Salt Lake City v. Silver Fork Pipeline Corp.*, 2000 UT 3, 5 P.3d 1206 (Utah 2000).

3 *Navajo Development Co., Inc. v. Sanderson*, 655 P.2d 1374 (Colo. 1982).

4 *Lindenmuth v. Safe Harbor Water Power Corporation*, 309 Pa. 58, 163 A. 159, 89 A.L.R. 1180 (1932). That the legislature has not provided for the recording of transfers of water rights does not prevent such transfers. *Johnston v. Little Horse Creek Irr. Co.*, 13 Wyo. 208, 79 P. 22 (1904).

As to the transfer of riparian rights, see §§ 51, 52.

As to appropriatory rights, see § 370.

As to rights in respect to subterranean waters, see §§ 220, 221.

As to the relinquishment or alienation of public title or ownership, see § 5.

5 *State of Wyo. v. State of Colo.*, 298 U.S. 573, 56 S. Ct. 912, 80 L. Ed. 1339 (1936) (water rights acquired by appropriation are transferable, in whole or in part, permanently or temporarily).

6 Davis v. Briggs, 117 Me. 536, 105 A. 128 (1918); Ross v. McGee, 98 Md. 389, 56 A. 1128 (1904); State v.
Johnson, 45 A.D.3d 1016, 846 N.Y.S.2d 671 (3d Dep't 2007).
7 Hard v. Boise City Irrigation & Land Co., 9 Idaho 589, 76 P. 331 (1904).
Boating, bathing, and fishing privileges, designed and used for commercial exploitation, constituting
easements in gross, are assignable where, as shown by the phrase "his heirs and assigns" in the deed creating
such easements, it was the intention of the parties to make them assignable. *Miller v. Lutheran Conference*
& Camp Ass'n, 331 Pa. 241, 200 A. 646, 130 A.L.R. 1245 (1938).
8 Miller v. Lutheran Conference & Camp Ass'n, 331 Pa. 241, 200 A. 646, 130 A.L.R. 1245 (1938).
9 Williamson v. Yingling, 80 Ind. 379, 1881 WL 7160 (1881).
10 Ross v. McGee, 98 Md. 389, 56 A. 1128 (1904).
11 Ackerman v. City of Walsenburg, 171 Colo. 304, 467 P.2d 267 (1970); R.D. Merrill Co. v. State, Pollution
Control Hearings Bd., 137 Wash. 2d 118, 969 P.2d 458 (1999).
As to appropriation of water and its associated rights, see §§ 355 to 382.
12 Clark v. Briscoe Irr. Co., 200 S.W.2d 674 (Tex. Civ. App. Austin 1947), dismissed on other grounds, (Dec.
10, 1947).
13 City of Colorado Springs v. Yust, 126 Colo. 289, 249 P.2d 151 (1952); *Clark v. Briscoe Irr. Co.*, 200 S.W.2d
674 (Tex. Civ. App. Austin 1947), dismissed on other grounds, (Dec. 10, 1947).
14 Farmers Highline Canal & Reservoir Co. v. City of Golden, 129 Colo. 575, 272 P.2d 629 (1954).
15 Clark v. Briscoe Irr. Co., 200 S.W.2d 674 (Tex. Civ. App. Austin 1947), dismissed on other grounds, (Dec.
10, 1947).
16 In re Referral of Lower Platte South Natural Resources Dist., 261 Neb. 90, 621 N.W.2d 299 (2001).
17 U.S. Const. Art. I, § 8, cl. 3.
18 Sporhase v. Nebraska, ex rel. Douglas, 458 U.S. 941, 102 S. Ct. 3456, 73 L. Ed. 2d 1254 (1982).

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II. Water Rights, Interests, and Uses

A. In General

3. Transfer

§ 18. Separately from land

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, Water Law  1279

Subject to statutory or contractual restrictions, all rights to water, riparian or otherwise, may be severed from the lands to which they are attached and separately conveyed.¹ Accordingly, water rights may be bought and sold without regard to the real property over which the water flows.² Once riparian rights are severed, no subsequent owner of the tract will have riparian rights except if the owner independently acquires riparian rights to unite with the now limited fee in the formerly riparian land.³

Practice Tip:

A water right may be severed from the land to which it is appurtenant by either of the following: (1) a grantor's conveyance of the land and an express reservation of the water right or (2) the grantor's conveyances of the land and the water right separately.⁴

On the other hand, a state statute may prohibit the sale of riparian rights apart from the land to which they apply.⁵ In one state, appurtenant water rights may not be severed or transferred although there is nothing to prevent the transferor of lands to

which such rights attach from providing that the benefit of the rights shall not pass to the transferee.⁶ Under some statutes, all appropriations of water for irrigation purposes are inseparable from and appurtenant to the specific land.⁷

Practice Tip:

A landowner may sever the right to extract nontributary groundwater from the ownership of the land, but absent explicit severance, a court should presume that the rights of extraction were transferred along with the land. Where a deed is silent, no presumption arises as to intent of the parties in regard to transfer of tributary water rights.⁸

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Footnotes

- 1 [Mohawk Valley Water Authority v. State](#), 78 A.D.3d 1513, 910 N.Y.S.2d 780 (4th Dep't 2010), leave to appeal denied, 17 N.Y.3d 702, 929 N.Y.S.2d 93, 952 N.E.2d 1088 (2011); [Burwell's Bay Improvement Ass'n v. Scott](#), 277 Va. 325, 672 S.E.2d 847 (2009).
An appurtenant water right may be transferred apart from the land which it benefits. [Adams v. Chilcott](#), 182 Mont. 511, 597 P.2d 1140 (1979).
As to separation of riparian rights from the land, see § 52.
- 2 [Navajo Development Co., Inc. v. Sanderson](#), 655 P.2d 1374 (Colo. 1982).
- 3 [Gunby v. Olde Severna Park Improvement Ass'n, Inc.](#), 174 Md. App. 189, 921 A.2d 292 (2007), judgment aff'd, 402 Md. 317, 936 A.2d 365 (2007).
- 4 [Axtell v. M.S. Consulting](#), 1998 MT 64, 288 Mont. 150, 955 P.2d 1362 (1998).
- 5 [Anchor Point Condominium Owner's Association v. Fish Tale Properties, LLC](#), 2008 WI App 133, 313 Wis. 2d 592, 758 N.W.2d 144 (Ct. App. 2008).
- 6 [Reppun v. Board of Water Supply](#), 65 Haw. 531, 656 P.2d 57 (1982).
- 7 [State ex rel. Blome v. Bridgeport Irrigation Dist.](#), 205 Neb. 97, 286 N.W.2d 426 (1979).
- 8 [Bayou Land Co. v. Talley](#), 924 P.2d 136 (Colo. 1996).

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II. Water Rights, Interests, and Uses

A. In General

3. Transfer

§ 19. Rights as passing by transfer of land

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, Water Law 1275 to 1277

Forms

[Am. Jur. Legal Forms 2d §§ 260:12, 260:13 \(Provision in deed of land—Grant of water rights\)](#)

[Am. Jur. Legal Forms 2d §§ 260:14, 260:15 \(Provision in deed of land—Reservation of water rights\)](#)

Water rights appurtenant to land generally pass under a deed of conveyance of such land unless expressly reserved.¹ Water rights are presumed transferred with the land absent an express reservation.² A water right, being appurtenant to the land where it is used, may pass with a conveyance of land even though the grant does not specifically mention the water right.³

Under rules pertinent to appropriation,⁴ unless expressly preserved, a vested water right considered appurtenant to land conveys only to the extent that it is used to the land's benefit at the time of the conveyance.⁵ Further, the right to extract nontributary groundwater does not necessarily pass with land.⁶

Practice Tip:

When an owner divides its land, conveying a large parcel to another party while reserving a smaller parcel that lay within it, an appurtenant right to use water from a spring located on the larger parcel passes with the conveyance to the other party, and an appurtenant water right remains with the owner, each in proportion to the extent of use beneficially applied to the land before the division.⁷

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Footnotes

1 Bayou Land Co. v. Talley, 924 P.2d 136 (Colo. 1996); Esbin v. Erickson, 987 So. 2d 198 (Fla. 3d DCA 2008); Bagley v. Thomason, 149 Idaho 799, 241 P.3d 972 (2010); Salt Lake City v. Silver Fork Pipeline Corp., 2000 UT 3, 5 P.3d 1206 (Utah 2000); Burwell's Bay Improvement Ass'n v. Scott, 277 Va. 325, 672 S.E.2d 847 (2009); Bentley v. Director of Office of State Lands and Investments, 2007 WY 94, 160 P.3d 1109 (Wyo. 2007).
For water rights as appurtenant or in gross, see § 7.

2 Nicoll v. Rudnick, 160 Cal. App. 4th 550, 72 Cal. Rptr. 3d 879 (5th Dist. 2008); Olde Severna Park Improvement Ass'n, Inc. v. Gunby, 402 Md. 317, 936 A.2d 365 (2007).

3 Axtell v. M.S. Consulting, 1998 MT 64, 288 Mont. 150, 955 P.2d 1362 (1998).

4 As to appropriation of water and its associated rights, see §§ 355 to 382.

5 Little v. Greene & Weed Inv., 839 P.2d 791 (Utah 1992).

6 In re Smith, 924 P.2d 155 (Colo. 1996).

7 Axtell v. M.S. Consulting, 1998 MT 64, 288 Mont. 150, 955 P.2d 1362 (1998).

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II. Water Rights, Interests, and Uses

A. In General

4. Contractual and Permissive Rights; Grants, Reservations, and Exceptions

§ 20. Generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, Water Law  1275 to 1295, 1598

Forms

- [Am. Jur. Legal Forms 2d § 86:40 \(Reservation—Riparian rights\)](#)
- [Am. Jur. Legal Forms 2d §§ 153:12 to 153:18 \(Contracts and leases pertaining to irrigation\)](#)
- [Am. Jur. Legal Forms 2d §§ 153:21 to 153:24 \(Lease provisions pertaining to irrigation\)](#)
- [Am. Jur. Legal Forms 2d §§ 153:43 to 153:69 \(Provisions in irrigation district contracts with water users\)](#)
- [Am. Jur. Legal Forms 2d § 180:124 \(Contract between city and property owner—Furnishing of water\)](#)
- [Am. Jur. Legal Forms 2d § 260:4 \(Form drafting guide—Checklist—Matters to be considered when drafting instrument or provision concerning water rights\)](#)
- [Am. Jur. Legal Forms 2d § 260:5 \(Form drafting guide—Checklist—Matters to be considered when drafting deed of land and water rights\)](#)
- [Am. Jur. Legal Forms 2d § 260:8 \(Agreement to furnish water\)](#)
- [Am. Jur. Legal Forms 2d §§ 260:14, 260:15 \(Provision in deed of land—Reservation of water rights\)](#)
- [Am. Jur. Legal Forms 2d §§ 260:14, 260:16 \(Provision in deed of land—Exception of water rights\)](#)
- [Am. Jur. Legal Forms 2d § 260:20 \(Assignment of water rights—Based on prior deed\)](#)
- [Am. Jur. Pleading and Practice Forms, Irrigation § 18 \(Checklist—Drafting a complaint in action for breach of contract to furnish irrigation water\)](#)

Am. Jur. Pleading and Practice Forms, Irrigation §§ 19 to 24 (Complaints, petitions, and declarations in irrigation causes of action)

Contracts pertaining to water rights generally are governed by much the same rules that pertain to other contracts so far as their existence is concerned.¹ Thus, a contract will not be implied from the conduct of the parties where no contract was intended.² Further, either party to a contract affecting water privileges may waive its rights under the contract.³

A reservation of water rights may, under some circumstances, be implied, as well as express.⁴ However, contracting away the ability to apply for a change in water rights can only be done expressly.⁵

If one contracts to deliver water to another for specific purposes, the law implies a warranty that the water will at least not be unfit for the required purpose on account of the contractor's own conduct. The unfitness of water for the purposes for which it was sold is not waived by an attempted use under protest and in reliance on a promise to correct the difficulty.⁶

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Footnotes

1 *Consolidated Canal Co. v. Mesa Canal Co.*, 177 U.S. 296, 20 S. Ct. 628, 44 L. Ed. 777 (1900); *Faught v. Platte Val. Public Power & Irr. Dist.*, 155 Neb. 141, 51 N.W.2d 253 (1952).
As to contractual rights, licenses, and easements in respect to the obstruction or detention of the waters of natural watercourses, see § 101.
As to contractual rights in respect to the drainage of surface waters, see § 197.
As to proprietary rights in respect to subterranean waters, see §§ 220, 221, 246, 252.
As to contracts relating to water rights as within the operation of the Statute of Frauds, see *Am. Jur. 2d, Statute of Frauds* § 54.
As to the character, as real or personal property, of covenants in respect to water rights, see *Am. Jur. 2d, Covenants, Conditions, and Restrictions* § 34.
As to water rights and easements as constituting a breach of a covenant against encumbrances, see *Am. Jur. 2d, Covenants, Conditions, and Restrictions* § 100.
As to the transfer or assignment of easements, licenses, and other conventional rights, see §§ 17 to 19.
2 *Wright v. Sonoma County*, 156 Cal. 475, 105 P. 409 (1909).
3 *Huston v. Bybee*, 17 Or. 140, 20 P. 51 (1888).
4 *Read v. Webster*, 95 Vt. 239, 113 A. 814, 16 A.L.R. 1068 (1921); *Bennett v. Booth*, 70 W. Va. 264, 73 S.E. 909 (1912).
5 *LoPresti v. Brandenburg*, 267 P.3d 1211 (Colo. 2011).
6 *Gold Ridge Min. Co. v. Tallmadge*, 44 Or. 34, 74 P. 325 (1903).

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§ 21. Leases and licenses

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West's Key Number Digest

West's Key Number Digest, Water Law  1293, 1294, 1598

Forms

[Am. Jur. Legal Forms 2d § 260:17](#) (Provision in lease—Grant of option to purchase land and water rights)

[Am. Jur. Legal Forms 2d § 260:18](#) (Provision in lease—Water rights of lessee of farm—Restriction on use of water)

[Am. Jur. Legal Forms 2d § 260:19](#) (Provision in lease—Reservation or exception of water rights)

Water rights and privileges are ordinarily subject to lease¹ and can be leased perpetually.² The parties to a lease transaction may specifically effect the severance of water rights from the land, but absent such, water right remains appurtenant, following title.³

If a lessor desires that any water rights developed by its lessee remain with the leased property upon termination of the lease, the lease can so provide.⁴

Rights in respect to waters may also be acquired by a license from the owner.⁵ An irrevocable license, such as one allowing the appropriation of creek water, is for all intents and purposes the equivalent of an easement.⁶

Footnotes

1 Bergeron v. Forger, 125 Vt. 207, 214 A.2d 85 (1965) (instrument was a lease rather than a license); [White v. Board of Land Com'rs, 595 P.2d 76 \(Wyo. 1979\)](#) (examining rights of the lessees).

2 [Dallas Creek Water Co. v. Huey, 933 P.2d 27 \(Colo. 1997\)](#).

3 [Department of State Lands v. Pettibone, 216 Mont. 361, 702 P.2d 948, 26 Ed. Law Rep. 823 \(1985\)](#).
As to severance of water right from the land, see § 18.
As to water rights as passing by transfer of land, see § 19.

4 [Hydro Resources Corp. v. Gray, 2007-NMSC-061, 143 N.M. 142, 173 P.3d 749 \(2007\)](#).

5 Bergeron v. Forger, 125 Vt. 207, 214 A.2d 85 (1965).

6 [Barnes v. Hussa, 136 Cal. App. 4th 1358, 39 Cal. Rptr. 3d 659 \(3d Dist. 2006\)](#).

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§ 22. Construction and effect of provisions

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West's Key Number Digest

West's Key Number Digest, Water Law  1276 to 1280, 1293 to 1295, 1598

The construction of a grant of water power or rights is largely dependent on the particular phraseology used and is closely bound up with the contemporaneous facts and circumstances.¹ The rules governing the construction of deeds generally apply when construing an instrument conveying water rights.² Whether a water right is transferred with the land depends on the intention of the parties, the circumstances surrounding the transfer, and whether such right is incident to or necessary for the beneficial enjoyment of the land.³ Whether a grant of a water right or easement is exclusive depends upon the intention of the parties, to be ascertained primarily from the language used in the instrument.⁴ Also, the practical construction given a grant by the parties to it is a weighty factor in determining its meaning.⁵ The construction given to a grant by the parties is ordinarily binding upon an assignee of the grantee.⁶

A grant of water easements carries with them by implication, as secondary or subsidiary easements, everything that is beneficially necessary, or incident to the grant, whether mentioned or not, and of two constructions of such a grant, that will be selected which gives to such appurtenant privileges the more convenient and reasonable mode of enjoyment.⁷ Thus, when a mill privilege is conveyed without any exact bounds set forth in the deed, the deed conveys so much land as is necessary and customarily used with the mill.⁸ However, it has been stated that a grant of water power is not a grant of property in the corpus of the water.⁹

A court should construe deed reservations regarding water rights which are made by developers, who have a duty to demonstrate an adequate water supply as part of a subdivision approval process, in favor of the homeowners or community water provider

benefiting the homeowners, and doubtful words and provisions in a water contract or deed are to be construed against the grantor who selected the terms therein.¹⁰

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Footnotes

1 McMillan v. Etter, 229 Mich. 366, 201 N.W. 499 (1924).

2 Cornish Town v. Koller, 758 P.2d 919 (Utah 1988).

3 In re Smith, 924 P.2d 155 (Colo. 1996) (right to extract nontributary groundwater).
Like transfers of tributary water rights, the right to withdraw nontributary groundwater may be transferred with or without the land, and ultimately, whether that right is transferred with the land is a question of fact that depends on the intention of the grantor and the particular circumstances of the case. [Bayou Land Co. v. Talley](#), 924 P.2d 136 (Colo. 1996).

4 Town of Gordonsville v. Zinn, 129 Va. 542, 106 S.E. 508, 14 A.L.R. 318 (1921).

5 McMillan v. Etter, 229 Mich. 366, 201 N.W. 499 (1924).

6 Irwin v. U S, 57 U.S. 513, 16 How. 513, 14 L. Ed. 1038, 1853 WL 7669 (1853).

7 U.S. ex rel. and for Use of Tennessee Val. Authority v. Hughes, 278 F. Supp. 733 (E.D. Tenn. 1967), judgment rev'd on other grounds, 408 F.2d 619 (6th Cir. 1969).

8 Brentwood Volunteer Fireman's Ass'n v. Musso, 159 N.H. 461, 986 A.2d 588 (2009).

9 Eastern Pennsylvania Power Co. v. Lehigh Coal & Navigation Co., 246 Pa. 72, 92 A. 47 (1914).

10 Chatfield East Well Co., Ltd. v. Chatfield East Property Owners Ass'n, 956 P.2d 1260 (Colo. 1998).

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§ 23. Construction and effect of provisions— As to nature of estate, interest, or obligation created

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, Water Law  1276 to 1280, 1293 to 1295, 1598

An agreement in respect to water rights in a stream may create a mere personal obligation, a license, a covenant running with the land, or an easement, depending upon the nature of the right in question and the terms of the agreement.¹ The general rule supported by most courts is that an instrument in respect to water rights in a stream which imposes on the owner of riparian lands the obligation to do, to allow to be done, or to refrain from doing something on the owner's lands in connection with the owner's rights as riparian owner, for the benefit of another, or which otherwise places a burden or confers a benefit on such lands, is held to create an easement appurtenant to, or a covenant running with, the land, which may be enforced by or against succeeding owners of the servient tenement, or, in the case of a covenant, owners of the land to which the covenant relates.² An obligation in the nature of a servitude upon an estate conveyed with a water privilege may be enforced, without any personal obligation of subsequent purchasers, under a stipulation that the grantee, the grantee's heirs and assigns, must pay a certain part of the sums paid for flowage or damages to the proprietors of lands above a reservoir.³ Well and riverbank easements are created for the benefit of the owner of the dominant estate and therefore are appurtenant to the land and pass with ownership of the dominant estate, as incident to it, without any mention of easements or appurtenances.⁴ In a few cases, agreements in respect to water rights have been held to create not covenants running with the land, nor easements, but mere personal obligations.⁵

In holding that instruments in respect to water rights have created easements or covenants running with the land, some courts have emphasized the fact that such instruments have in terms granted or reserved such rights to, or imposed obligations upon, the "heirs" or "assigns" of the grantee or grantor or that the agreement as to such rights was expressly made for the benefit not only of the covenantee but also of his "heirs" and "assigns."⁶ On the other hand, the absence of such terms will not prevent the creation of an easement or covenant running with the land.⁷

A purchaser's right to extract nontributary groundwater underneath the purchaser's land derives from the land purchase, and where a deed of trust by which land is transferred specifically includes water rights, the deed of trust encumbers the purchaser's interest in the nontributary groundwater.⁸

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Footnotes

1 [Stacy v. Glen Ellyn Hotel & Springs Co.](#), 223 Ill. 546, 79 N.E. 133 (1906).

2 [Johnson v. Armour & Co.](#), 69 N.D. 769, 291 N.W. 113, 127 A.L.R. 828 (1940) (contract; easement); [Painter v. Alexandria Water Co.](#), 202 Va. 431, 117 S.E.2d 674 (1961).
Generally, as to the character of a water right or an easement as appurtenant or in gross, see [§ 7](#).
For discussion of the character, as real or personal, of covenants relating to waters and water rights, see [Am. Jur. 2d, Covenants, Conditions, and Restrictions](#) § 34.

3 [Whittenton Mfg. Co. v. Staples](#), 164 Mass. 319, 41 N.E. 441 (1895).

4 [Bauerbach v. LWR Ents., Inc.](#), 169 Ohio App. 3d 20, 2006-Ohio-4991, 861 N.E.2d 864 (4th Dist. Washington County 2006).

5 [McLeod v. Colorado Power Co.](#), 71 Colo. 518, 208 P. 463 (1922).

6 [Murphy v. Kerr](#), 5 F.2d 908, 41 A.L.R. 1359 (C.C.A. 8th Cir. 1925).

7 [Brush v. Lehigh Valley Coal Co.](#), 290 Pa. 322, 138 A. 860 (1927).

8 [In re Smith](#), 924 P.2d 155 (Colo. 1996).

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§ 24. Extent of rights granted or reserved; quantity of water

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West's Key Number Digest

West's Key Number Digest, Water Law  1275 to 1299, 1598

Riparian rights implicitly conveyed by a grant are limited to those rights necessary to fulfill the intent of the grant.¹ Once a water right is transferred, the new owner of the water right is prohibited from enlarging the water right beyond the original owner's use.²

The extent or amount of water rights or waterpower intended to be conveyed by a grant depends primarily upon the language used in the grant and, where that language is not plain, certain, and unambiguous, the attendant and surrounding circumstances of the particular case.³ Where a deed of waterpower contains no limitation as to the number of hours per day the water is to be used, the grantee may use the water as many hours a day as the grantee wishes.⁴ The extent of an upper landowner's easement for drainage and protection is that which the parties might reasonably expect from the future normal development of the dominant tenement.⁵

Where the scope of a water right is defined by contract, the general provisions of a state's water law are not necessarily inapplicable, but their application may be subject to the terms of the contract. A contract water user is, in effect, a consumer whose rights are determined by the terms of that contract, and successors-in-interest can acquire no greater right.⁶

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Footnotes

¹ *Burwell's Bay Improvement Ass'n v. Scott*, 277 Va. 325, 672 S.E.2d 847 (2009).

² *Axtell v. M.S. Consulting*, 1998 MT 64, 288 Mont. 150, 955 P.2d 1362 (1998).

3 Wilton Woolen Co. v. G.H. Bass & Co., 112 Me. 483, 92 A. 612 (1914).

4 Wilton Woolen Co. v. G.H. Bass & Co., 112 Me. 483, 92 A. 612 (1914); Essex Co. v. Gibson, 82 N.H. 139,
130 A. 846 (1925).

5 Locklin v. City of Lafayette, 7 Cal. 4th 327, 27 Cal. Rptr. 2d 613, 867 P.2d 724 (1994).

6 City of Thornton v. Bijou Irr. Co., 926 P.2d 1 (Colo. 1996).

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§ 25. Extent of rights granted or reserved; quantity of water—Purpose or use of water

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West's Key Number Digest

West's Key Number Digest, Water Law  1275 to 1299, 1598

In granting water rights, the purpose for which they are to be used is frequently mentioned, and the question then arises as to whether or not the grant is limited to that use. In considering this question, it may be conceded that the grantor is entitled to restrict the use to specified purposes.¹ However, in construing a provision in a grant of waterpower limiting the use to be made of it, it has been customary for the courts to adopt a liberal construction and to favor that interpretation which will be least burdensome on the grantee. An interpretation is preferred which will give the grantee an unrestricted, rather than a limited, right to the quantity granted. Such a construction is more beneficial to the community, and to the grantee, and can seldom injure the grantor. It may therefore be stated as a general rule that wherever the wording of a deed or other instrument makes it doubtful whether a limitation of the quantity of waterpower or a restriction of the use of the waterpower is contemplated, the courts will adopt the former construction. Ordinarily, a mere mention of a particular use is not of itself sufficient to make that use exclusive. Nor will a construction that would restrict the grantees to the specific use to which the water was first applied be adopted unless the language of the grants unmistakably indicates that this was the intention of the parties.² Where, however, the express and unambiguous language of the grant reveals an intention to limit the use of the water, that intention must be given effect.³

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Footnotes

1

Ficklen v. Fredericksburg Power Co., 133 Va. 571, 112 S.E. 775 (1922).

A deed granting the exclusive right to "fish and boat" in waters owned by the grantor does not convey any bathing rights in such waters. *Miller v. Lutheran Conference & Camp Ass'n*, 331 Pa. 241, 200 A. 646, 130 A.L.R. 1245 (1938).

2

Ficklen v. Fredericksburg Power Co., 133 Va. 571, 112 S.E. 775 (1922).

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§ 26. Generally

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West's Key Number Digest

West's Key Number Digest, Water Law  1532, 1533, 1535 to 1551, 1665 to 1696

A.L.R. Library

Injunction against repeated or continuing trespasses on real property, 60 A.L.R.2d 310

Forms

[Am. Jur. Pleading and Practice Forms, Waters § 21](#) (Complaint, petition, or declaration—To remove cloud on title to water rights)

[Am. Jur. Pleading and Practice Forms, Waters § 27](#) (Complaint, petition, or declaration—To enjoin threatened interference with water right—Senior right based on adverse possession)

[Am. Jur. Pleading and Practice Forms, Waters §§ 28 to 30](#) (Complaint, petition, or declaration—To enjoin actual interference with water right)

The usual remedies for an unlawful interference with water rights are an action for the recovery of the damages sustained¹ and an injunction to prevent a threatened or continuing injury or trespass.² According to some authorities, an injunction to

restrain an unlawful interference with water rights may be granted, although the owner contemplates no immediate exercise or enjoyment of such rights, in order to prevent the loss of the right by adverse use.³ However, injunctive relief will not be granted where it necessarily involves an adjudication of the title to, and property rights in, water and the right to convey it to the land of others.⁴ A preliminary injunction may be appropriate in some circumstances to restrain defendants from interfering with access to water, pending resolution of the litigation.⁵

A court of equity may, in a proper case, decree the specific performance of a grant of a water right or of a contract to supply water.⁶

CUMULATIVE SUPPLEMENT

Cases:

Doctrine of claim preclusion barred United States from asserting late claims for storage water rights in reservoirs, where United States' water rights in such reservoirs were already decreed in previous general adjudications without objection, and United States' late claims asserted priority dates which predated same adjudications. [Idaho Code Ann. § 42-1420. United States v. Black Canyon Irrigation District, 408 P.3d 52 \(Idaho 2017\)](#).

[END OF SUPPLEMENT]

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Footnotes

- 1 [Price v. High Shoals Mfg. Co., 132 Ga. 246, 64 S.E. 87 \(1909\); Clear Springs Foods, Inc. v. Spackman, 150 Idaho 790, 252 P.3d 71 \(2011\); Wagner v. Purity Water Co., 241 Pa. 328, 88 A. 484 \(1913\); Kerbs v. Walck, 2010 WY 53, 229 P.3d 974 \(Wyo. 2010\).](#)
As to the measure and elements of damage, see § 30.
- 2 [Atchison v. Peterson, 87 U.S. 507, 22 L. Ed. 414, 1874 WL 17312 \(1874\); Clear Springs Foods, Inc. v. Spackman, 150 Idaho 790, 252 P.3d 71 \(2011\).](#)
- 3 [Robertson v. Arnold, 182 Ga. 664, 186 S.E. 806, 106 A.L.R. 681 \(1936\); Woody v. Durham, 267 S.W.2d 219 \(Tex. Civ. App. Fort Worth 1954\), writ refused.](#)
- 4 [Blanchard v. Holland, 106 Colo. 147, 103 P.2d 18, 139 A.L.R. 159 \(1940\).](#)
- 5 [Koepp v. Holland, 688 F. Supp. 2d 65 \(N.D. N.Y. 2010\) \(applying New York law\).](#)
- 6 [Moore v. Chesapeake & O. Ry. Co., 159 Va. 703, 167 S.E. 351 \(1933\).](#)
A neighbor wrongfully interfered with a landowner's water and easement rights for a ditch and enlarged the use of that ditch's water when he plowed over the ditch, cutting it off from landowner's property. Thus, an injunction for specific performance was warranted, ordering the neighbor to reconstruct the ditch, provide for an easement for the ditch across the northern part of his 40-acre lower parcel to the landowner's adjoining parcel, and cease diverting any water that the landowner's legal interest entitled him to divert to his parcel. [Archuleta v. Gomez, 2012 CO 71, 290 P.3d 482 \(Colo. 2012\).](#)

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§ 27. Parties

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West's Key Number Digest

West's Key Number Digest, Water Law  1537, 1541, 1675, 1676

Water rights adjudications may be initiated by private claimants, but all water users whose rights may be affected must be joined.¹ However, the public interest may be best be served by the State's intervention in suits over rights to water.² On the other hand, a public power and irrigation district that did not have a direct and legal interest in the subject matter of a surface water appropriator's action against groundwater users could not intervene as a matter of right where the district could gain or lose nothing in the resolution of the dispute.³

An environmental organization may show that it has a substantial interest in proceedings involving a permit to remove water from a river, and thus, it has standing to participate in such proceedings where the organization's purpose and mission is to protect the river as a natural resource, the organization's principal activities are the use and enjoyment of the river, and the proposed withdrawal of water would result in conditions that could inhibit boating on the river.⁴

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Footnotes

- 1 [Rosette, Inc. v. U.S. Dept. of the Interior](#), 142 N.M. 717, 2007-NMCA-136, 169 P.3d 704 (Ct. App. 2007).
- 2 [Helderman v. Wright](#), 2006 OK 86, 152 P.3d 855 (Okla. 2006).
- 3 [Spear T Ranch, Inc. v. Knaub](#), 271 Neb. 578, 713 N.W.2d 489 (2006).
- 4 [St. Johns Riverkeeper, Inc. v. St. Johns River Water Management](#), 54 So. 3d 1051 (Fla. 5th DCA 2011).

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§ 28. Limitations and laches

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Water Law](#) 1539, 1673

The right to equitable relief against interference with or injury to water rights may be lost by laches.¹ However, a successful laches defense must meet a high standard in the water right context. There must be some degree of turpitude in the conduct of a party before a court of equity will estop it from the assertion of title when the effect of the estoppel is to forfeit its property and transfer its enjoyment to another.²

The statute of limitations upon a cause of action for interference with the operation of a mill by deposits in a stream commences to run at the time when damage and loss occur rather than when the original act is done.³

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Footnotes

1 [State of Washington v. State of Oregon](#), 297 U.S. 517, 56 S. Ct. 540, 80 L. Ed. 837 (1936).

2 [In re Water Rights of Central Colorado Water Conservancy Dist.](#), 147 P.3d 9 (Colo. 2006).

3 [Pickens v. Coal River Boom & Timber Co.](#), 66 W. Va. 10, 65 S.E. 865 (1909).

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§ 29. Effect of McCarran Amendment

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Water Law](#) 1672, 1700 to 1731

The McCarran Amendment authorizes the adjudication of the United States' reserved water rights.¹ In light of the clear federal policies underlying the McCarran Amendment, a water rights suit brought by the United States in federal court may be properly dismissed in favor of a concurrent comprehensive adjudication reaching the same issues in state court.² The McCarran Amendment provides state courts with jurisdiction to adjudicate Indian water rights held in trust by the United States, and the rule that a suit brought by the United States in a federal court may be properly dismissed in favor of a concurrent state court adjudication is not limited only to that minority of Indian water claims located in states without jurisdictional reservations as the effect of the McCarran Amendment was not meant to differ from state to state.³

Observation:

The doctrine of federal reserved water rights represents a limited exception to the general rule that individual states govern water rights within their respective borders. Courts must construe the doctrine of federal reserved water rights narrowly.⁴

In administering water rights, a state is compelled to respect federal law regarding federal reserved rights, and to the extent it does not, its judgments are reviewable by the United States Supreme Court.⁵

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Footnotes

- 1 43 U.S.C.A. § 666.
- 2 *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 103 S. Ct. 3201, 77 L. Ed. 2d 837 (1983).
As to deferral of actions in federal court pending determinations of concurrent state actions, see *Am. Jur. 2d, Federal Courts* §§ 1109 to 1125.
- 3 *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 103 S. Ct. 3201, 77 L. Ed. 2d 837 (1983).
- 4 *State of N.M. ex rel. State Engineer v. Commissioner of Public Lands*, 145 N.M. 433, 2009-NMCA-004, 200 P.3d 86, 241 Ed. Law Rep. 409 (Ct. App. 2008).
- 5 *U.S. v. State of Or.*, 44 F.3d 758 (9th Cir. 1994).

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§ 30. Measure and elements of damages

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West's Key Number Digest

West's Key Number Digest, Water Law 1536, 1548, 1551, 1692 to 1694, 1696

A.L.R. Library

Interest on damages for period before judgment for injury to, or detention, loss, or destruction of, property, 36 A.L.R.2d 337

Any interference with a vested right to the use of water, whether from open streams, lakes, ponds, percolating or subterranean water, would entitle the party injured to damages.¹ In accordance with general principles regarding breaches of covenants of title,² the measure of damages for breach of covenants in a deed to water rights warranting title and for quiet enjoyment is the value of the rights at the time the conveyance was made, with interest, cost, and reasonable expense incurred in defending the title, and does not include the value of improvements made by the vendee.³

A lower riparian owner who is damaged by an illegal invasion of the owner's property rights, such as the continuous, unreasonable diminution and detention of the water in a stream by an upper owner, is entitled to nominal damages even though the owner shows no special damage.⁴

Damages due to loss of profits resulting from an unlawful interference with water rights or waterpower may be recovered, according to most authorities, where such loss can be established with reasonable certainty⁵ but not where such profits are remote, speculative, contingent, or uncertain.⁶

Interest on the amount of damages recovered in actions involving interference with water rights is allowed in some jurisdictions⁷ but not in others.⁸

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Footnotes

1 [Clear Springs Foods, Inc. v. Spackman](#), 150 Idaho 790, 252 P.3d 71 (2011).

2 [Am. Jur. 2d, Covenants, Conditions, and Restrictions §§ 127 to 147](#).

3 [Taylor v. Holter](#), 1 Mont. 688, 1872 WL 7229 (1872).

The owner of a servient estate is not entitled to damages for the percent of its costs of operating, maintaining, and repairing wells which provided water to the owner of the dominant estate, absent direct evidence of the amount of water used by either party or any evidence from which a satisfactory calculation can be made as to the amount due. [Shadow Isle, Inc. v. Granada Feeding Co.](#), 226 Neb. 325, 411 N.W.2d 331 (1987).

4 [Price v. High Shoals Mfg. Co.](#), 132 Ga. 246, 64 S.E. 87 (1909).

5 [Pickens v. Coal River Boom & Timber Co.](#), 58 W. Va. 11, 50 S.E. 872 (1905).

A trial court's award of \$13,917.95 in damages to a landowner for his reduced crop production during several irrigation seasons, in the landowner's action against a neighbor for interference with the landowner's water rights by installing a dam in his irrigation ditches, was not excessive or unreasonable; the district court's calculations for lost production did not show any hint of passion or prejudice. [Kerbs v. Walck](#), 2010 WY 53, 229 P.3d 974 (Wyo. 2010).

As to the right to recover for loss of profits, see [Am. Jur. 2d, Damages §§ 442 to 461](#).

6 [Maynard v. Nemaha Valley Drainage Dist. No. 2](#), 94 Neb. 610, 143 N.W. 927 (1913).

7 [Gerlach Livestock Co. v. U.S.](#), 111 Ct. Cl. 1, 76 F. Supp. 87 (1948), judgment aff'd, 339 U.S. 725, 70 S. Ct. 955, 94 L. Ed. 1231, 20 A.L.R.2d 633 (1950).

8 [Foster v. City of Augusta](#), 174 Kan. 324, 256 P.2d 121 (1953); [McKain v. Platte Val. Public Power & Irrigation Dist.](#), 151 Neb. 497, 37 N.W.2d 923 (1949).

As to the allowance of interest on the amount recovered in tort actions, see [Am. Jur. 2d, Damages §§ 473 to 479](#).

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78 Am. Jur. 2d Waters § 31

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II. Water Rights, Interests, and Uses

A. In General

5. Actions and Remedies

§ 31. Complaint, evidence, and proof

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, Water Law  1532, 1533, 1535 to 1545, 1677 to 1687

Forms

- [Am. Jur. Pleading and Practice Forms, Waters § 25](#) (Complaint, petition, or declaration—Allegation—Prescriptive right to water)
- [Am. Jur. Pleading and Practice Forms, Waters §§ 27 to 30, 33](#) (Complaint, petition, or declaration—To enjoin interference with water rights)
- [Am. Jur. Pleading and Practice Forms, Waters §§ 31, 32](#) (Complaint, petition, or declaration—To enjoin diversion of water)
- [Am. Jur. Pleading and Practice Forms, Waters §§ 36 to 45 \(Answer—Defenses\)](#)
- [Am. Jur. Pleading and Practice Forms, Waters §§ 46 to 48](#) (Findings of fact—In actions involving water rights)
- [Am. Jur. Pleading and Practice Forms, Waters §§ 49 to 56](#) (Judgment or decree—In actions involving water rights)

Requirements for complaints, admissible evidence, and burdens of proof differ widely in the various jurisdictions and are extremely fact-specific. However, it is certainly universally true that where a trespass upon water rights is sought to be restrained, the allegations of the complaint must be clear and precise as to the title upon which relief is prayed and as to the boundaries of the land in question.¹

An applicant for a permit to transport state groundwater out-of-state bears the burden of providing a state administrative body with enough evidence on which to base a decision.² In order to claim an easement by implication for the delivery of water, the

claimant must prove that such easement is reasonably necessary for the proper enjoyment of the claimant's estate and that the claimant is unable to obtain the water from another source at a reasonable expense.³ There is a presumption, in at least one state, that easements adjoining nonnavigable ponds and streams include access to the center of the water (the low-water mark at common law), but the parties may alter this presumption by express terms in the deed.⁴

Evidence that upper riparian landowners unilaterally plugged a dam owned by a lower riparian landowner and harvested the dam's trees for their own benefit raised a fact issue for a jury as to whether the upper riparian landowners in bad faith trespassed, created a nuisance, and converted the lower riparian landowner's property and whether attorney's fees and punitive damages were authorized.⁵

Decrees entered in proceedings to establish water rights, although not final, are *prima facie* correct and can only be attacked in a direct proceeding instituted for that purpose.⁶

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Footnotes

- 1 [Garbarino v. Noce](#), 181 Cal. 125, 183 P. 532, 6 A.L.R. 1433 (1919); [Axline v. Shaw](#), 35 Fla. 305, 17 So. 411 (1895).
- 2 [Ponderosa Ridge LLC v. Banner County](#), 250 Neb. 944, 554 N.W.2d 151 (1996).
- 3 [Shultz v. Atkins](#), 97 Idaho 770, 554 P.2d 948 (1976).
- 4 [Jordan v. Vogel](#), 59 A.D.3d 919, 874 N.Y.S.2d 306 (3d Dep't 2009).
- 5 [Bishop Eddie Long Ministries, Inc. v. Dillard](#), 272 Ga. App. 894, 613 S.E.2d 673 (2005).
- 6 [Rogers v. Nevada Canal Co.](#), 60 Colo. 59, 151 P. 923 (1915).

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78 Am. Jur. 2d Waters § 32

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II. Water Rights, Interests, and Uses

A. In General

5. Actions and Remedies

§ 32. Complaint, evidence, and proof—Parol evidence of reservation of water rights

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, Water Law 1532, 1533, 1535 to 1545, 1677 to 1687

A.L.R. Library

Admissibility of parol evidence with respect to reservations or exceptions upon conveyance of real property, 61 A.L.R.2d 1390

Contrary conclusions have been reached as to the admissibility of parol evidence to show an oral reservation of a water right upon the conveyance of land, and there is some authority that such evidence is admissible,¹ but on the other hand, parol evidence was not admissible to show that prior to the execution of a deed conveying a railroad right-of-way, it was agreed between the parties that in the construction of the railroad, a spring on the land of the grantor should not be interfered with.² Parol evidence is not admissible to aid in the construction of an express reservation or exception of a water right where the language of the conveyance and the reservation or exception is clear and unambiguous.³

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Footnotes

¹ *Wood v. Village of Richfield Springs*, 163 A.D. 103, 148 N.Y.S. 498 (3d Dep't 1914); *Tanner v. Carter*, 2001 UT 18, 20 P.3d 332 (Utah 2001).

2 [Louisville & N.R. Co. v. Holland](#), 132 Ga. 173, 63 S.E. 898 (1909).
As to parol reservations and exceptions, generally, see [Am. Jur. 2d, Deeds § 67](#).

3 [Loch Sheldrake Associates v. Evans](#), 306 N.Y. 297, 118 N.E.2d 444 (1954); [Randall v. Clifford](#), 119 Vt. 216, 122 A.2d 833 (1956).
Generally, as to parol evidence in aid of the construction of a reservation or exception, see [Am. Jur. 2d, Deeds § 269](#).

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Research References

West's Key Number Digest

West's Key Number Digest, Water Law  1220 to 1226, 1228 to 1271, 1275 to 1299, 1455 to 1462, 1468, 1532, 1533, 1538 to 1551, 2536, 2651

A.L.R. Library

A.L.R. Index, Riparian and Littoral Ownership and Rights

West's A.L.R. Digest, Water Law  1220 to 1226, 1228 to 1271, 1275 to 1299, 1455 to 1462, 1468, 1532, 1533, 1538 to 1551, 2536, 2651

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II. Water Rights, Interests, and Uses

B. Riparian and Littoral Ownership and Rights

1. In General

§ 33. Terminology

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West's Key Number Digest

West's Key Number Digest, Water Law  1220

"Riparian" means pertaining to or situated on the bank of a river,¹ or a stream,² or, in some states, of, relating to, or abutting any body of water.³ A "riparian owner" is one whose land is bounded by a river,⁴ and "riparian rights" are the rights that such an owner has to the use of the water⁵ and relate to land on the bank of a river or stream.⁶ "Riparian rights" are vested property rights that arise out of ownership of land bounded or traversed by navigable water.⁷

"Littoral" is the term for describing the rights that shoreline owners possess to make exclusive use of the land lying seaward of the mean high water mark,⁸ and "littoral rights" are those rights concerning properties abutting an ocean, sea, or lake rather than a river or stream; littoral rights are usually concerned with the use and enjoyment of the shore.⁹ In a state without an oceanfront, the difference between riparian rights and littoral rights is that riparian rights deal with access to river water by owners of property abutting the river, and littoral rights deal with property abutting a lake.¹⁰

The riparian rights available to the owners of property bounded or traversed by water are derived from two distinct properties: (1) the principal estate of land extending to the shoreline of the body of water in question and (2) the appurtenant estate of submerged land in the body of water in question benefiting the principal estate.¹¹ Appurtenant water rights are rights to the use of water utilized by parcels of land at the time of their original conversion into fee simple land.¹²

CUMULATIVE SUPPLEMENT

Cases:

Littoral rights is equivalent to riparian rights but is the more technically accurate term when referring to the rights of landowners abutting a lake. [Kramer v. City of Lake Oswego](#), 365 Or. 422, 446 P.3d 1 (2019).

[END OF SUPPLEMENT]

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Footnotes

- 1 [Mobile Docks Co. v. City of Mobile](#), 146 Ala. 198, 40 So. 205 (1906); [Little v. Kin](#), 249 Mich. App. 502, 644 N.W.2d 375 (2002), judgment aff'd, 468 Mich. 699, 664 N.W.2d 749 (2003); [Kapp v. Hansen](#), 79 S.D. 279, 111 N.W.2d 333 (1961).
- 2 [Wehby v. Turpin](#), 710 So. 2d 1243 (Ala. 1998).
- 3 [Gregg Neck Yacht Club, Inc. v. County Com'rs of Kent County](#), 137 Md. App. 732, 769 A.2d 982 (2001); [Lynnhaven Dunes Condominium Ass'n v. City of Virginia Beach](#), 733 S.E.2d 911 (Va. 2012); [Stoesser v. Shore Drive Partnership](#), 172 Wis. 2d 660, 494 N.W.2d 204 (1993).
The words "riparian owner" have been frequently applied also to ownership on the shores of the sea or of a lake, a condition more accurately expressed by the phrase "littoral owner." [Florio v. State ex rel. Epperson](#), 119 So. 2d 305, 80 A.L.R.2d 1117 (Fla. 2d DCA 1960); [Farnes v. Lane](#), 281 Minn. 222, 161 N.W.2d 297 (1968).
- 4 [TH Investments, Inc. v. Kirby Inland Marine, L.P.](#), 218 S.W.3d 173 (Tex. App. Houston 14th Dist. 2007).
- 5 [City of Barstow v. Mojave Water Agency](#), 23 Cal. 4th 1224, 99 Cal. Rptr. 2d 294, 5 P.3d 853 (2000); [Brainard v. State](#), 12 S.W.3d 6 (Tex. 1999) (disapproved on other grounds of by, [Martin v. Amerman](#), 133 S.W.3d 262 (Tex. 2004)).
- 6 [Secretary of State v. Gunn](#), 75 So. 3d 1015 (Miss. 2011).
- 7 [L & S Water Power, Inc. v. Piedmont Triad Regional Water Authority](#), 712 S.E.2d 146 (N.C. Ct. App. 2011), review allowed, 724 S.E.2d 518 (N.C. 2012) and review dismissed as improvidently granted, 736 S.E.2d 484 (N.C. 2012).
- 8 [Lane v. Commissioner of Environmental Protection](#), 136 Conn. App. 135, 43 A.3d 821 (2012), certification granted in part, 307 Conn. 906, 53 A.3d 221 (2012).
- 9 [Secretary of State v. Gunn](#), 75 So. 3d 1015 (Miss. 2011).
- 10 [Bay Point Properties, L.L.C. v. Northlake Estates Condominium Assn.](#), 183 Ohio App. 3d 311, 2009-Ohio-3671, 916 N.E.2d 1119 (3d Dist. Logan County 2009).
- 11 [Newcomb v. County of Carteret](#), 207 N.C. App. 527, 701 S.E.2d 325 (2010), review denied, 365 N.C. 212, 710 S.E.2d 26 (2011).
- 12 [Reppun v. Board of Water Supply](#), 65 Haw. 531, 656 P.2d 57 (1982).

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II. Water Rights, Interests, and Uses

B. Riparian and Littoral Ownership and Rights

1. In General

§ 34. Recognition of rights; application of common-law rules

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, Water Law 1221 to 1225

A.L.R. Library

Right of public in shore of inland navigable lake between high- and low-water marks, 40 A.L.R.3d 776

Apportionment and division of area of river as between riparian tracts fronting on same bank, in absence of agreement or specification, 65 A.L.R.2d 143

Forms

[Am. Jur. Pleading and Practice Forms, Fish and Game § 7](#) (Complaint, petition, or declaration—For declaratory judgment as to littoral rights—To enjoin fishing in private lake)

[Am. Jur. Pleading and Practice Forms, Waters § 67](#) (Complaint, petition, or declaration—For damages and injunctive relief—Diversion of creek waters by upper riparian owner)

[Am. Jur. Pleading and Practice Forms, Waters § 70](#) (Instruction to jury—Riparian waters)

Model Codes and Restatements

Restatement Second, Torts §§ 843, 844

Riparian rights in the states are settled by the states for themselves.¹ It is for the State to determine to what waters, and to what extent, the prerogatives of the State are exercised in regulating and controlling the shores of its waters and the lands under them, and if any state determines to resign to riparian proprietors rights that properly belong to the State in its sovereign capacity, it is not for others to raise objections.² A state has the power to modify or reject the doctrine of riparian rights.³

The common law of England in reference to riparian rights has been adopted in most jurisdictions in the United States either in full or to such an extent as the circumstances and conditions existing in the particular jurisdiction have seemed to warrant.⁴ In some states, unless otherwise excepted, the common law controls in determining water rights;⁵ riparian rights, while derived from common law, are modified by statute.⁶ In other states, a modified common-law riparian right to the reasonable use of a stream is the controlling norm of law while a statutory right to appropriate stream water coexists with, but does not preempt or abrogate, the riparian owner's common-law right.⁷ Just as riparian rights afforded by common law are property rights, so too are riparian rights afforded by statute.⁸

In some jurisdictions, especially in the arid and semiarid states of the west, the common law is declared to be unsuited to the conditions, and the principle of prior appropriation is applied,⁹ and in reference to the diversion of waters to nonriparian uses, the common-law rule is in some cases disregarded or greatly modified.¹⁰ In some jurisdictions, no riparian rights can be claimed in navigable waters as against the State.¹¹

Observation:

The riparian doctrine is recognized primarily in the eastern, midwestern, and southern states.¹²

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Footnotes

- 1 [Federal Power Commission v. Niagara Mohawk Power Corp.](#), 347 U.S. 239, 74 S. Ct. 487, 98 L. Ed. 666 (1954); [Harrell v. City of Conway](#), 224 Ark. 100, 271 S.W.2d 924 (1954); [Thurston v. City of Portsmouth](#), 205 Va. 909, 140 S.E.2d 678 (1965).
- 2 [Priewe v. Wisconsin State Land & Improvement Co.](#), 93 Wis. 534, 67 N.W. 918 (1896).

3 Matter of Chumstick Creek Drainage Basin in Chelan County, 103 Wash. 2d 698, 694 P.2d 1065 (1985).
4 Shively v. Bowlby, 152 U.S. 1, 14 S. Ct. 548, 38 L. Ed. 331 (1894).
5 State v. Zawistowski, 95 Wis. 2d 250, 290 N.W.2d 303 (1980).
6 Center Townhouse Corp. v. City of Mishawaka, 882 N.E.2d 762 (Ind. Ct. App. 2008); Worton Creek Marina,
LLC v. Claggett, 381 Md. 499, 850 A.2d 1169 (2004).
7 Franco-American Charolaise, Ltd. v. Oklahoma Water Resources Bd., 1990 OK 44, 855 P.2d 568 (Okla.
1990), reissued, (Apr. 13, 1993).
Riparian doctrine confers upon the owner of land contiguous to a watercourse the right to the reasonable and
beneficial use of water on such owner's land. All riparians on a stream system are vested with a common
ownership such that, in times of water shortage, all riparians must reduce their usage proportionately, and
the diversion of water for other than riparian or overlying uses is subject to the appropriation doctrine.
Under that doctrine, the appropriator's right to the water is subordinate to those of riparian users and earlier
appropriators. [North Gualala Water Co. v. State Water Resources Control Bd.](#), 139 Cal. App. 4th 1577, 43
Cal. Rptr. 3d 821 (1st Dist. 2006), as modified on other grounds on denial of reh'g, (June 16, 2006).
8 County Com'r's of Kent County v. Claggett, 152 Md. App. 70, 831 A.2d 77 (2003), judgment aff'd, [381 Md.](#)
499, 850 A.2d 1169 (2004).
9 Board of County Com'r's of County of Arapahoe v. Collard, 827 P.2d 546 (Colo. 1992).
As to principle of prior appropriation, often simply called "appropriation," see § 355.
As to conflicts between riparian and appropriatory rights, see § 374.
10 San Joaquin & Kings River Canal & I. Co. v. Fresno F. & I. Co., 158 Cal. 626, 112 P. 182 (1910).
11 Port of Seattle v. Oregon & W. R. Co., 255 U.S. 56, 41 S. Ct. 237, 65 L. Ed. 500 (1921).
12 Colorado v. New Mexico, 459 U.S. 176, 103 S. Ct. 539, 74 L. Ed. 2d 348 (1982).

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II. Water Rights, Interests, and Uses

B. Riparian and Littoral Ownership and Rights

2. Basis and Nature of Rights; Limitations on Rights and Ownership

§ 35. Generally

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West's Key Number Digest

West's Key Number Digest, Water Law  1225, 1226, 1229 to 1245

Riparian or littoral rights are not common to the citizens at large but exist as natural and inherent incidents of the ownership of riparian land.¹ Riparian rights, where they exist, derive from the ownership of land contiguous to or traversed by a watercourse² rather than out of the ownership of the bed of the stream or body of water.³ They are ordinarily the same whether the title to the soil under the water is in the riparian proprietor or in the state.⁴ Whether waters are navigable is not determinative of riparian rights since such rights do not arise from the ownership of the waterbed but as an incident to the ownership of the abutting land.⁵

Similarly, littoral rights are incidental property rights associated with ownership of lakeshore property.⁶

While the exact nature of such rights has been variously described, it is generally agreed that they constitute property rights, possessing the usual attributes and incidents of property,⁷ and are entitled to protection as such.⁸

Observation:

Although riparian rights are, in fact, property, rather than simply rights that constitute elements of ownership, they are so limited by superior public rights that they may be referred to as a mere franchise.⁹ In some states, riparian and littoral rights are not property rights per se as instead they are mere licenses or privileges and as such are revocable.¹⁰

Riparian and littoral rights ordinarily cannot be taken for a public use without compensation to the owner¹¹ and cannot be taken at all or impaired for a private use.¹²

Definition:

"Usufructuary" is defined as use and enjoyment of the profits of property belonging to another as long as that property is not damaged or altered in any way.¹³

Caution:

Riparian rights are usufructuary only, and while conferring a legal right to use the water that is superior to all other users, they confer no right of private ownership in public waters.¹⁴

A riparian owner's interest in the water of a stream ceases after it passes the owner's land.¹⁵

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Footnotes

1 Stoesser v. Shore Drive Partnership, 172 Wis. 2d 660, 494 N.W.2d 204 (1993).

2 Thurston v. City of Portsmouth, 205 Va. 909, 140 S.E.2d 678 (1965); Matter of Deadman Creek Drainage Basin in Spokane County, 103 Wash. 2d 686, 694 P.2d 1071 (1985).

The mere fact that one owns property abutting a natural body of water presumptively confers certain rights.
Stoesser v. Shore Drive Partnership, 172 Wis. 2d 660, 494 N.W.2d 204 (1993).

3 Ames Lake Community Club v. State, 69 Wash. 2d 769, 420 P.2d 363 (1966).

4 Yates v. City of Milwaukee, 77 U.S. 497, 19 L. Ed. 984, 1870 WL 12827 (1870).

5 Johnson v. Seifert, 257 Minn. 159, 100 N.W.2d 689 (1960).

6 Lakeside Lodge, Inc. v. Town of New London, 158 N.H. 164, 960 A.2d 1268 (2008).

7 Yates v. City of Milwaukee, 77 U.S. 497, 19 L. Ed. 984, 1870 WL 12827 (1870).

A riparian owner's right to the use of the shoreline and the water is a property right. *Bino v. City of Hurley*, 273 Wis. 10, 76 N.W.2d 571, 56 A.L.R.2d 778 (1956).

8 Thurston v. City of Portsmouth, 205 Va. 909, 140 S.E.2d 678 (1965).
9 Port Clinton Associates v. Board of Selectmen of Town of Clinton, 217 Conn. 588, 587 A.2d 126 (1991).
10 Mississippi State Highway Com'n v. Gilich, 609 So. 2d 367 (Miss. 1992).
11 Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection, 130 S. Ct. 2592, 177 L. Ed. 2d 184 (2010).
As to eminent domain over riparian property, see [Am. Jur. 2d, Eminent Domain §§ 181 to 189](#).
For declaration or assumption of state ownership of waters as subject to vested riparian rights, see [§ 4](#).
12 [Hillebrand v. Knapp](#), 65 S.D. 414, 274 N.W. 821, 112 A.L.R. 1104 (1937).
As to the taking of private property for private uses, see [Am. Jur. 2d, Eminent Domain § 43](#).
13 [Sokaogon Chippewa Community v. Exxon Corp.](#), 805 F. Supp. 680 (E.D. Wis. 1992), judgment aff'd, 2 F.3d 219 (7th Cir. 1993).
14 [City of Barstow v. Mojave Water Agency](#), 23 Cal. 4th 1224, 99 Cal. Rptr. 2d 294, 5 P.3d 853 (2000).
Although the right of ownership in land may carry with it a legal right to enjoy some benefits from adjacent waters, this does not mean that an abstract and absolute property right in water, good against all the world, hovers over the shoreland. [U.S. v. Willow River Power Co.](#), 324 U.S. 499, 65 S. Ct. 761, 89 L. Ed. 1101 (1945).
15 [Kennebunk, Kennebunkport and Wells Water Dist. v. Maine Turnpike Authority](#), 147 Me. 149, 84 A.2d 433 (1951).

78 Am. Jur. 2d Waters § 36

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2. Basis and Nature of Rights; Limitations on Rights and Ownership

§ 36. Correlative or mutual nature of rights

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, Water Law 1232, 1238

A.L.R. Library

Relative riparian or littoral rights respecting the removal of water from a natural, private, nonnavigable lake, 54 A.L.R.2d 1450

Model Codes and Restatements

Restatement Second, Torts §§ 850 to 854

Equality of right between riparian owners is the essence of water law, each owner having an equal right to make a reasonable use of the waters of a stream, subject to the equal right of the other owners likewise to make a reasonable use.¹ The use of the stream by each proprietor is therefore limited to what is reasonable, having due regard for the rights of others above, below, or on the opposite shore.² A person owning land bordering a stream therefore may use water on that person's land, but a riparian owner must share the right to use water with other riparian owners.³ Riparian rights of property owners abutting the same body

of water are equal, and no such property owner may exercise its riparian rights in a manner that prevents the exercise of the same rights by other similarly situated property owners.⁴

The same principle applies with regard to littoral proprietors in the case of lakes⁵ and oceans,⁶ and each littoral owner shares littoral rights with all other littoral owners, and none may unreasonably interfere with the like rights of others.⁷

The special rights of riparian or littoral owners are those which are necessary for the use and enjoyment of the owner's abutting property and the business lawfully conducted there, qualified only by the correlative rights of other abutting owners,⁸ and by certain rights of the public,⁹ and they are to be so exercised as not to injure others in the enjoyment of their rights.¹⁰

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Footnotes

- 1 [U.S. v. Willow River Power Co.](#), 324 U.S. 499, 65 S. Ct. 761, 89 L. Ed. 1101 (1945).
As to what constitutes "reasonable use," see [§ 37](#).
As to reasonable use in extraction or diversion, see §§ [56](#) to [58](#).
- 2 [State of Colo. v. State of Kan.](#), 320 U.S. 383, 64 S. Ct. 176, 88 L. Ed. 116 (1943).
Georgia's water rights law is based on the natural flow theory of riparian rights doctrine modified by the reasonable use provision, and under this theory, every riparian owner is entitled to the reasonable use of water and to have the stream pass over the owner's land according to its natural flow subject to a reasonable use of water by other riparian owners. [Stewart v. Bridges](#), 249 Ga. 626, 292 S.E.2d 702 (1982).
- 3 [California Farm Bureau Federation v. State Water Resources Control Bd.](#), 51 Cal. 4th 421, 121 Cal. Rptr. 3d 37, 247 P.3d 112 (2011), as modified, (Apr. 20, 2011).
- 4 [Alderson v. Fatlan](#), 231 Ill. 2d 311, 325 Ill. Dec. 548, 898 N.E.2d 595 (2008).
- 5 [Harris v. Brooks](#), 225 Ark. 436, 283 S.W.2d 129, 54 A.L.R.2d 1440 (1955); [Taylor v. Tampa Coal Co.](#), 46 So. 2d 392 (Fla. 1950).
- 6 [Lummis v. Lilly](#), 385 Mass. 41, 429 N.E.2d 1146 (1982).
- 7 [Rice v. Naimish](#), 8 Mich. App. 698, 155 N.W.2d 370 (1967).
- 8 [Johnson v. Seifert](#), 257 Minn. 159, 100 N.W.2d 689 (1960); [In re Adjudication of Water Rights In Medina River Watershed of San Antonio River Basin](#), 670 S.W.2d 250 (Tex. 1984).
- 9 [Lewis Blue Point Oyster Cultivation Co. v. Briggs](#), 229 U.S. 82, 33 S. Ct. 679, 57 L. Ed. 1083 (1913); [Johnson v. Seifert](#), 257 Minn. 159, 100 N.W.2d 689 (1960); [Cordovana v. Vipond](#), 198 Va. 353, 94 S.E.2d 295, 65 A.L.R.2d 138 (1956).
As to public and riparian rights in navigable waters, see §§ [165](#) to [188](#).
Physical properties obstructing navigable waters of the United States and all rights to use those waters are held by private persons under a dominant servitude in favor of the United States; however, the exercise of that servitude, without making allowance for preexisting rights under state law, requires clear congressional authorization. [Federal Power Commission v. Niagara Mohawk Power Corp.](#), 347 U.S. 239, 74 S. Ct. 487, 98 L. Ed. 666 (1954).
- 10 [Weaver v. Beech Aircraft Corp.](#), 180 Kan. 224, 303 P.2d 159 (1956).

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2. Basis and Nature of Rights; Limitations on Rights and Ownership

§ 37. Requirement for reasonable use

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, Water Law  1238

Model Codes and Restatements

Restatement Second, Torts § 850A

What is a "reasonable" use depends on a balance between the riparian owner's own needs and those of other riparian owners¹ and varies with the facts and circumstances of the case.²

The factors considered relevant to reasonable use by riparian owners can be considered in evaluating the same question when applied to littoral owners.³ The American Law Institute states that the factors that affect the determination may include the following:

- (1) purpose of the use;
- (2) suitability of the use to the watercourse or lake;
- (3) economic value of the use;
- (4) social value of the use;

- (5) extent and amount of the harm it causes;
- (6) practicality of avoiding the harm by adjusting the use or method of use of one proprietor or the other;
- (7) practicality of adjusting the quantity of water used by each proprietor;
- (8) protection of existing values of water uses, land, investments, and enterprises;
- (9) justice of requiring the user causing harm to bear the loss.⁴

Riparian rights may include the right to use the shoreline and have access to the waters; the right to reasonable use of the waters for domestic, agricultural, and recreational purposes; and the right to construct a pier or similar structure in aid of navigation.⁵ The riparian owner's right is to have the water pass its land in its natural course; each proprietor may make any use of the water flowing over its premises that does not essentially or materially diminish the quantity, corrupt the quality, or detain it so as to deprive other proprietors or the public of a fair and reasonable participation in its benefits.⁶

Observation:

The reasonableness of a use of water by a riparian proprietor is not controlled by the classification of the use as riparian or nonriparian.⁷

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Footnotes

- 1 Okaw Drainage Dist. of Champaign and Douglas County, Ill. v. National Distillers and Chemical Corp., 882 F.2d 1241 (7th Cir. 1989).
- 2 In re Waters of Long Valley Creek Stream System, 25 Cal. 3d 339, 158 Cal. Rptr. 350, 599 P.2d 656 (1979).
- 3 Lummis v. Lilly, 385 Mass. 41, 429 N.E.2d 1146 (1982).
- 4 Restatement Second, Torts § 850A.
- 5 Konneker v. Romano, 2010 WI 65, 326 Wis. 2d 268, 785 N.W.2d 432 (2010).
- 6 In re Flood Litigation, 216 W. Va. 534, 607 S.E.2d 863 (2004).
- 7 Restatement Second, Torts § 855.

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§ 38. Governmental control or regulation

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West's Key Number Digest

West's Key Number Digest, Water Law  1235, 1237, 2536, 2651

A.L.R. Library

Validity of local beachfront zoning regulations designed to exclude recreational uses by persons other than beachfront residents, 18 A.L.R.4th 568

Riparian rights are not absolute, but are subject to reasonable regulation¹ for the protection of the public,² although the State may not deny or destroy the vested rights of riparian or littoral proprietors.³ The police power of the State is applicable to such property and the enjoyment thereof.⁴ While a riparian landowner has certain rights which inhere in the ownership of land adjacent to a body of water, these rights are subject to reasonable regulation by the State in the exercise of public trust rights.⁵ The rights of riparian owners are qualified, subordinate, and subject to the paramount interest of the State and the paramount rights of the public in navigable waters,⁶ and accordingly, riparian rights are subject to a navigational servitude retained by the State.⁷ Further, the title to riparian lands fronting on navigable rivers is subject to the superior right of the public's legal servitude for the making and repairing of levees, roads, and other public and common works.⁸ A state is free to change its laws governing riparian ownership and to permit the appropriation of flowing water for such purposes as it may deem wise.⁹

Caution:

The regulatory power of the states is subject to the paramount authority of the federal government in respect to commerce and navigation.¹⁰

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Footnotes

- 1 Gustafson v. City of Lake Angelus, 76 F.3d 778, 1996 FED App. 0065P (6th Cir. 1996) (applying Michigan law); Square Lake Hills Condominium Ass'n v. Bloomfield Tp., 437 Mich. 310, 471 N.W.2d 321 (1991).
- 2 Lane v. Commissioner of Environmental Protection, 136 Conn. App. 135, 43 A.3d 821 (2012), certification granted in part, 307 Conn. 906, 53 A.3d 221 (2012).
- 3 Board of Park Com'r's of City of Des Moines v. Diamond Ice Co., 130 Iowa 603, 105 N.W. 203 (1905).
- 4 Shorehaven Golf Club, Inc. v. Water Resources Commission, 146 Conn. 619, 153 A.2d 444 (1959); Johnson v. Seifert, 257 Minn. 159, 100 N.W.2d 689 (1960); Cummins v. Travis County Water Control and Improvement Dist. No. 17, 175 S.W.3d 34 (Tex. App. Austin 2005).
Any statutory regulation which is for the general advantage of owners of common property, such as a regulation of riparian rights, will be upheld as reasonable. Head v. Amoskeag Mfg. Co., 113 U.S. 9, 5 S. Ct. 441, 28 L. Ed. 889 (1885).
- 5 Great Cove Boat Club v. Bureau of Public Lands, 672 A.2d 91 (Me. 1996); Bloomquist v. Commissioner of Natural Resources, 704 N.W.2d 184 (Minn. Ct. App. 2005); R.W. Docks & Slips v. State, 2001 WI 73, 244 Wis. 2d 497, 628 N.W.2d 781 (2001).
- 6 Berkos v. Shipwreck Bay Condominium Ass'n, 2008 WI App 122, 313 Wis. 2d 609, 758 N.W.2d 215 (Ct. App. 2008); R.W. Docks & Slips v. State, 2001 WI 73, 244 Wis. 2d 497, 628 N.W.2d 781 (2001).
- 7 Peterman v. State Dept. of Natural Resources, 446 Mich. 177, 521 N.W.2d 499 (1994).
- 8 DeSambourg v. Board of Com'r's for Grand Prairie Levee Dist., 621 So. 2d 602 (La. 1993).
- 9 State of Connecticut v. Com. of Mass., 282 U.S. 660, 51 S. Ct. 286, 75 L. Ed. 602 (1931).
As to statutory provisions for appropriation, generally, see § 359.
- 10 Matheny v. Tennessee Valley Authority, 503 F. Supp. 2d 917 (M.D. Tenn. 2007); Freed v. Miami Beach Pier Corporation, 93 Fla. 888, 112 So. 841, 52 A.L.R. 1177 (1927).
As to federal authority in respect to the regulation of navigable waters, generally, see § 151.

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§ 39. Who may exercise riparian or littoral rights

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, Water Law  1225, 1229 to 1231

Subject to certain exceptions hereinafter noted,¹ riparian rights subsist only for riparian proprietors, and those who do not own or control riparian land cannot claim them.² A riparian proprietor is an owner of land in actual contact with the water; proximity without contact is insufficient.³

The possession of land, in order to give rise to riparian or littoral rights, must be unitary in the sense that no part of the parcel is separated from the rest by intervening land in another possession.⁴ A private easement appurtenant affording access to a lake over another's land adjacent to the water does not make the grantee of the easement a littoral owner entitled to exercise littoral rights.⁵

It is immaterial whether the ownership of the land bounded by a watercourse is in a corporation or in a natural person as in either case, the ownership gives rise to riparian rights.⁶ The State, or a subdivision thereof, as the owner of riparian lands, is entitled to the same incidents of riparian ownership that any other owner would have.⁷

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Footnotes

¹ As to separation of rights from land, see § 52.

² *Crutchfield v. F. A. Sebring Realty Co.*, 69 So. 2d 328 (Fla. 1954); *Martinez v. Cook*, 56 N.M. 343, 244 P.2d 134 (1952).

³ *Inland Harbor Homeowners Ass'n, Inc. v. St. Josephs Marina, LLC*, 724 S.E.2d 92 (N.C. Ct. App. 2012).

4 [Wasserburger v. Coffee](#), 180 Neb. 149, 141 N.W.2d 738 (1966), opinion modified on other grounds on reh'g, 180 Neb. 569, 144 N.W.2d 209 (1966).
5 Generally, as to the requirement that riparian or littoral land be contiguous, see §§ [46](#), [47](#).
6 [Farnes v. Lane](#), 281 Minn. 222, 161 N.W.2d 297 (1968).
7 [Bowman v. Wathen](#), 42 U.S. 189, 1 How. 189, 11 L. Ed. 97, 1843 WL 5970 (1843).
 [State of Oklahoma v. State of Texas](#), 258 U.S. 574, 42 S. Ct. 406, 66 L. Ed. 771 (1922).

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§ 40. Generally

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West's Key Number Digest

West's Key Number Digest, Water Law 1228 to 1232(3)

A.L.R. Library

Allocation of water space among lakefront owners, in absence of agreement or specification, 14 A.L.R.4th 1028

Rights of fishing, boating, bathing, or the like in inland lakes, 57 A.L.R.2d 569

The apportionment of riparian rights, as between adjoining riparian owners, often is made by extending lines from the ends of the sidelines of the properties at right angles to the line of the waterfront, if the latter is straight or substantially so, subject to variation where the line of navigation is not parallel with the shoreline, without regard to the direction of the dividing lines of the upland parcels.¹ However, riparian rights do not necessarily extend into the waters according to land boundary lines, nor do such rights, under all conditions, extend at right angles with the shoreline.²

In the case of a lake suitable for domestic or recreational uses, a littoral owner has a right to make such use of the lake over its entire surface, in common with all other abutting owners, provided the littoral owner's use is reasonable and does not unduly interfere with the rights of the others regardless of the navigable or public character of the lake and regardless of the ownership of the bed thereof.³ One littoral owner is not entitled to use a lake to the exclusion of other littoral owners.⁴ However, if in granting land bordering on a small lake capable of private ownership the lines are run through the lake, no littoral right to the

use of the whole lake is acquired by any grantee, but barriers may be placed along the division lines which will exclude the owners of all other portions of the lake bed from the use, for recreational purposes, of the water within them.⁵

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Footnotes

1 [Spottswood v. Reimer, 41 So. 3d 787 \(Ala. Civ. App. 2009\).](#)
Where the general course of a shore is a curved convex line, the division of littoral rights between adjoining landowners is along the line of the radius of the curve extended from the intersection of the upland boundary between the parties and the high-water mark. [Water Street Associates Ltd. Partnership v. Innopak Plastics Corp., 230 Conn. 764, 646 A.2d 790 \(1994\).](#)

2 [Freed v. Miami Beach Pier Corporation, 93 Fla. 888, 112 So. 841, 52 A.L.R. 1177 \(1927\).](#)
As to property or divisional lines between contiguous owners of the beds and banks of streams and other bodies of water, see §§ 311 to 314.

3 [Johnson v. Seifert, 257 Minn. 159, 100 N.W.2d 689 \(1960\); Bach v. Sarich, 74 Wash. 2d 575, 445 P.2d 648 \(1968\).](#)
As to relative private boating rights on inland lakes, see [Am. Jur. 2d, Boats and Boating § 29.](#)

4 [Florio v. State ex rel. Epperson, 119 So. 2d 305, 80 A.L.R.2d 1117 \(Fla. 2d DCA 1960\).](#)

5 [Wickouski v. Swift, 203 Va. 467, 124 S.E.2d 892 \(1962\).](#)

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3. Territorial Rights

§ 41. Rights of opposite landowners

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, Water Law 1228 to 1232(3)

As between owners of lands on opposite sides of a stream, the rights of each are to be exercised, ordinarily, on each owner's own side of the middle or thread of the stream.¹ Opposite riparian owners upon the same channel have a common and equal right to the use of all the water flowing in that channel as it passes their lands.² Where a river is divided by an island, the owners of the main shores are not regarded as opposite owners within the operation of the rules above stated, but each of these has for his or her opposite the owner of the shore of the island facing each owner's land.³ The division of the waters of a river into two distinct channels by an island entitles the riparian owners on each channel to so much of the water as would naturally flow there and no more.⁴

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Footnotes

¹ [Holyoke Co. v. Lyman](#), 82 U.S. 500, 21 L. Ed. 133, 1872 WL 15441 (1872).

² [Warren v. Westbrook Mfg. Co.](#), 86 Me. 32, 29 A. 927 (1893).

³ [Wilson v. Watson](#), 141 Ky. 324, 132 S.W. 563 (1910), opinion withdrawn in part on reh'g on other grounds, 144 Ky. 352, 138 S.W. 283 (1911); [Warren v. Westbrook Mfg. Co.](#), 86 Me. 32, 29 A. 927 (1893).

⁴ [Warren v. Westbrook Mfg. Co.](#), 86 Me. 32, 29 A. 927 (1893).

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4. Rights of Riparian and Littoral Owners

§ 42. Generally

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West's Key Number Digest

West's Key Number Digest, Water Law 1231 to 1245

A.L.R. Library

Public rights of recreational boating, fishing, wading, or the like in inland stream the bed of which is privately owned, 6
A.L.R.4th 1030

At common law, a riparian owner has a right to the beneficial use of the water of a river or stream passing through or adjacent to the owner's land.¹ The owner has a property interest in the flow of a natural watercourse through or adjacent to the owner's property. The right of enjoying this flow without disturbance, interference, or material diminution by any other proprietor is a natural right, and is an incident of property in the land, like the right the proprietor has to enjoy the soil itself without molestation from neighbors.² The owner has the right to be and remain a riparian proprietor and to enjoy the natural advantages thereby conferred upon the land by its adjacency to the water.³

The owner has the right to have access to the waters, including a way to and from the navigable part;⁴ the right to reasonable use of the waters for domestic, agricultural, and recreational purposes; and the right to construct a pier or similar structure in aid of navigation.⁵ In addition, the owner has the right to any lands formed by accretion or reliction,⁶ the right to have water flow to the land without artificial obstruction, and the limited right to intrude onto a lake or river bed to construct devices for protection from erosion.⁷ In addition, a riparian owner may use a river and its waters for drinking and drainage.⁸

Practice Tip:

Consumptive, recreational, and aesthetic riparian rights are considered to be vested property rights, which may not be taken by inverse condemnation or by zoning; however, riparian rights may be limited in order to further state policy encouraging beneficial use.⁹

A riparian owner is entitled to have the extent of the owner's rights on the line of navigability of a water course determined and marked, along with the owner's proper share of the flats, or land under water, and those boundaries defined.¹⁰ The right of the owner of land bordering on navigable waters to an unobstructed view of or over such waters has been recognized in some cases.¹¹

Riparian or littoral owners also have the right to use the stream, current, or body of the water, as distinguished from the diversion and use of the water itself, for certain purposes.¹² A riparian owner may pump water into a river for its use downstream, at least as long as it does not unreasonably interfere with the rights of other riparian owners.¹³ If a stream is nonnavigable, a riparian landowner who owns land adjoining both sides of the stream may put a fence across the stream to prevent trespassers upon their property.¹⁴

The commercial operation of a marina does not constitute an unreasonable use of riparian rights as a matter of law where there is a need for the facility, where the facility does not impinge upon any public right, where the use is consistent with the public policy of encouraging the private development of waterfronts, where there is no authority for a superior right of a municipality to develop a shoreline, and where the marina does not interfere with any public right of passage or access and is providing a needed public service.¹⁵

CUMULATIVE SUPPLEMENT

Cases:

Nothing in the Lake Protection Act's (LPAs) definition of littoral rights confers on littoral landowners the right to a particular view. [Idaho Code Ann. § 58-1302\(f\). Newton v. MJK/BJK, LLC, 469 P.3d 23 \(Idaho 2020\).](#)

[END OF SUPPLEMENT]

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Footnotes

1 [Wisniewski v. Gemmill, 123 N.H. 701, 465 A.2d 875 \(1983\).](#)

2 [In re Flood Litigation, 216 W. Va. 534, 607 S.E.2d 863 \(2004\).](#)

3 [Scott v. Burwell's Bay Imp. Ass'n, 281 Va. 704, 708 S.E.2d 858 \(2011\).](#)

4 Scott v. Burwell's Bay Imp. Ass'n, 281 Va. 704, 708 S.E.2d 858 (2011).
5 ABKA Ltd. Partnership v. Wisconsin Dept. of Natural Resources, 2002 WI 106, 255 Wis. 2d 486, 648
N.W.2d 854 (2002).
6 Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection, 130 S. Ct. 2592, 177
L. Ed. 2d 184 (2010) (applying Florida law); Scott v. Burwell's Bay Imp. Ass'n, 281 Va. 704, 708 S.E.2d
858 (2011).
7 R.W. Docks & Slips v. State, 2001 WI 73, 244 Wis. 2d 497, 628 N.W.2d 781 (2001).
8 Okaw Drainage Dist. of Champaign and Douglas County, Ill. v. National Distillers and Chemical Corp., 882
F.2d 1241 (7th Cir. 1989).
As to right of access to navigable waters, see § 169; to a lake or pond, see §§ 130, 132.
As to right to extract and use the water, to a certain extent, see §§ 55 to 67.
As to right to use water for irrigation, see Am. Jur. 2d, Irrigation §§ 9 to 15.
As to right to have the stream flow in its natural course and volume, see § 93.
As to right to have the body of water remain in its natural condition, see § 133.
As to right to additions to the land by accretions or reliction, see §§ 330, 333.
9 Matter of Deadman Creek Drainage Basin in Spokane County, 103 Wash. 2d 686, 694 P.2d 1071 (1985).
10 Carr v. Kidd, 261 Va. 81, 540 S.E.2d 884 (2001).
11 Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection, 130 S. Ct. 2592, 177 L.
Ed. 2d 184 (2010) (applying Florida law); Treuting v. Bridge and Park Commission of City of Biloxi, 199
So. 2d 627 (Miss. 1967).
12 As to bathing or swimming, see § 44.
As to boating and fishing rights, see Am. Jur. 2d, Boats and Boating §§ 2, 28 to 30; Am. Jur. 2d, Fish, Game,
and Wildlife Conservation §§ 23, 24.
13 Okaw Drainage Dist. of Champaign and Douglas County, Ill. v. National Distillers and Chemical Corp., 882
F.2d 1241 (7th Cir. 1989).
14 State ex rel. Meek v. Hays, 246 Kan. 99, 785 P.2d 1356 (1990).
15 Board of Trustees of Town of Huntington v. W. Wilton Wood, Inc., 97 A.D.2d 781, 468 N.Y.S.2d 520 (2d
Dep't 1983).

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§ 43. Navigation

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West's Key Number Digest

West's Key Number Digest, Water Law 1231 to 1245

A.L.R. Library

Public rights of recreational boating, fishing, wading, or the like in inland stream the bed of which is privately owned, 6
A.L.R.4th 1030

A riparian owner's right of access to the water does not carry with it a concomitant private property right to navigate.¹ A riparian owner may use the navigable waters and the lands under them opposite the owner's land for purposes of navigation and of conducting commerce or business there, but such right is only concurrent with that of other inhabitants of the state and must be exercised subject to the rights of others.² In addition, no owner of property adjacent to state-owned waters which are navigable for recreational purposes has a right to control the use of those waters as they flow through the property as the public has a right to use the waters and bed and banks up to ordinary high-water mark.³ However, if a stream is nonnavigable, a riparian landowner who owns land adjoining both sides of the stream may put a fence across the stream to prevent trespassers upon their property.⁴

If a river's waters are owned by the State and held in trust for the people by the State, no private party may bar the use of those waters by the people.⁵

Footnotes

- 1 Becker v. Litty, 318 Md. 76, 566 A.2d 1101 (1989).
- 2 Mildenberger v. U.S., 643 F.3d 938 (Fed. Cir. 2011) (applying Florida law).
- 3 Montana Coalition for Stream Access, Inc. v. Hildreth, 211 Mont. 29, 684 P.2d 1088 (1984) (overruled on other grounds by, [Gray v. City of Billings](#), 213 Mont. 6, 689 P.2d 268 (1984)).
- 4 [State ex rel. Meek v. Hays](#), 246 Kan. 99, 785 P.2d 1356 (1990).
- 5 Montana Coalition for Stream Access, Inc. v. Curran, 210 Mont. 38, 682 P.2d 163 (1984).

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§ 44. Bathing or swimming

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West's Key Number Digest

West's Key Number Digest, Water Law 1232(3), 1235 to 1237

A.L.R. Library

Validity of local beachfront zoning regulations designed to exclude recreational uses by persons other than beachfront residents, 18 A.L.R.4th 568

Public rights of recreational boating, fishing, wading, or the like in inland stream the bed of which is privately owned, 6 A.L.R.4th 1030

Rights of fishing, boating, bathing, or the like in inland lakes, 57 A.L.R.2d 569

Validity of prohibition or regulation of bathing, swimming, boating, fishing, or the like, to protect public water supply, 56 A.L.R.2d 790

The right of a riparian or littoral owner to a reasonable use of the stream or body of water ordinarily carries with it the right to bathe and swim there.¹ Such an owner is entitled, in common with the public, to the right to bathe in navigable waters.²

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Footnotes

¹ *Harris v. Brooks*, 225 Ark. 436, 283 S.W.2d 129, 54 A.L.R.2d 1440 (1955) (holding that lawful uses of water in a stream or lake include fishing, swimming, recreation, and irrigation); *Kranz v. Meyers Subdivision*

Property Owners Ass'n, Inc., 969 N.E.2d 1068 (Ind. Ct. App. 2012), decision clarified on reh'g, 973 N.E.2d 615 (Ind. Ct. App. 2012), transfer denied, 980 N.E.2d 324 (Ind. 2012) and transfer denied, 980 N.E.2d 324 (Ind. 2012); Dyball v. Lennox, 260 Mich. App. 698, 680 N.W.2d 522 (2004); Bino v. City of Hurley, 273 Wis. 10, 76 N.W.2d 571, 56 A.L.R.2d 778 (1956).

2 Freed v. Miami Beach Pier Corporation, 93 Fla. 888, 112 So. 841, 52 A.L.R. 1177 (1927); Thiesen v. Gulf, F. & A. Ry. Co., 75 Fla. 28, 78 So. 491 (1917).

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4. Rights of Riparian and Littoral Owners

§ 45. Rights as to artificial conditions

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, Water Law  1229

Riparian rights do not ordinarily attach to artificial water bodies or streams.¹ However, in some cases, where the usage of the artificial body of water has long been settled, it may be appropriate to treat the artificial body as the legal equivalent of a natural one for purposes of determining riparian rights.² Thus, riparian rights may attach to a watercourse that has been artificially altered, under certain circumstances.³ The owner of property that lies adjacent to or beneath a man-made, nonnavigable water body is not entitled to the beneficial use of the surface waters of the entire water body by sole virtue of the fact that he or she owns contiguous lands.⁴

Where a riparian owner has improved its land by artificial means which incidentally benefit adjoining land, whether upper or lower, the courts are split on whether the proprietor of the land so benefited has a right to have such artificial condition continued or, at least, to have it left undisturbed. Some courts have denied the existence of such a right,⁵ and others have found the owner of such adjoining land acquires a reciprocal right to enjoy the benefits of the improvement.⁶ In some cases, the courts, in sustaining the right of the landowner incidentally benefited by the improvement or artificial condition to have it continued, have based their decision on the grounds of prescription and estoppel.⁷

In some cases, the question whether reciprocal rights in artificial conditions may be acquired by a riparian owner by prescription is made dependent upon the character of the condition as temporary or permanent, and if temporary, such right is denied, but the situation is otherwise if the condition is permanent.⁸

Footnotes

1 [Publix Super Markets, Inc. v. Pearson](#), 315 So. 2d 98 (Fla. 2d DCA 1975).

2 [Alderson v. Fatlan](#), 231 Ill. 2d 311, 325 Ill. Dec. 548, 898 N.E.2d 595 (2008).

3 [Johnson v. Board of County Com'rs of Pratt County](#), 259 Kan. 305, 913 P.2d 119 (1996).

4 [Lee v. Cercoa, Inc.](#), 433 So. 2d 1 (Fla. 4th DCA 1983).

5 [Goodrich v. McMillan](#), 217 Mich. 630, 187 N.W. 368, 26 A.L.R. 801 (1922); [Drainage Dist. No. 2 of Snohomish County v. City of Everett](#), 171 Wash. 471, 18 P.2d 53, 88 A.L.R. 123 (1933).
An upper riparian owner constructing and maintaining an artificial structure diverting the flow of seepage and floodwaters for a purpose advantageous to it is not obligated by mere lapse of time to maintain the structure and the conditions produced thereby although it incidentally benefits lower landowners. [In re Drainage Dist. No. 5 of Dawson County](#), 179 Neb. 80, 136 N.W.2d 364 (1965) (court syllabus).
For rights in respect to artificial conditions, generally, see § 8.

6 [Marshall Ice Co. v. La Plant](#), 136 Iowa 621, 111 N.W. 1016 (1907); [Kray v. Muggli](#), 84 Minn. 90, 86 N.W. 882 (1901).

7 [Hammond v. Antwerp Light & Power Co.](#), 132 Misc. 786, 230 N.Y.S. 621 (Sup 1928).

8 [Lake Drummond Canal & Water Co. v. Burnham](#), 147 N.C. 41, 60 S.E. 650 (1908).

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§ 46. Generally

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West's Key Number Digest

West's Key Number Digest, Water Law  1225, 1229 to 1231, 1455 to 1462

Model Codes and Restatements

Restatement Second, Torts § 843

The extent of lands having riparian status is determined by three criteria: (1) the land is contiguous to or abuts the stream; (2) the parcel is the smallest parcel held under one title in the chain of title leading to the current owner; and (3) the parcel is within the watershed of the stream.¹ Land, in order to be considered riparian or littoral land, must be in actual contact with the water, proximity without contact being insufficient.² Riparian rights attach only to lands touching on a watercourse or through which it flows, and not to any lands physically separated from the stream and the land bordering on it, even though belonging to the same owner.³ Riparian rights extend to the land between the actual water level and the ordinary high-water mark.⁴

Observation:

The existence or nonexistence of littoral rights is to be determined with the lake waters in their usual and normal condition, and a temporary departure from this condition does not alter the littoral character of such lands or the littoral rights of the owners of such lands.⁵

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Footnotes

1 [Phelps v. State Water Resources Control Bd.](#), 157 Cal. App. 4th 89, 68 Cal. Rptr. 3d 350 (3d Dist. 2007).

2 [Illinois Cent. R. Co. v. State of Illinois](#), 146 U.S. 387, 13 S. Ct. 110, 36 L. Ed. 1018 (1892).

3 [Thompson v. Enz](#), 379 Mich. 667, 154 N.W.2d 473 (1967).

A riparian owner on a navigable stream who, by utilizing an artificial channel carrying into the navigable stream the waters of a parallel nonnavigable stream, creates an artificial water level for the purpose of a hydroelectric plant the tail waters from which were discharged into the navigable stream cannot, in aid of its position as riparian owner on the navigable stream, claim rights also as riparian owner on the nonnavigable stream where its property thereon is riparian only to the artificial channel. [U.S. v. Willow River Power Co.](#), 324 U.S. 499, 65 S. Ct. 761, 89 L. Ed. 1101 (1945).

As to the ownership of islands as carrying riparian rights, see [§ 353](#).

4 [State v. McFarren](#), 62 Wis. 2d 492, 215 N.W.2d 459 (1974).

5 [Rice v. Naimish](#), 8 Mich. App. 698, 155 N.W.2d 370 (1967).

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§ 47. Title

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West's Key Number Digest

West's Key Number Digest, Water Law 1229 to 1231

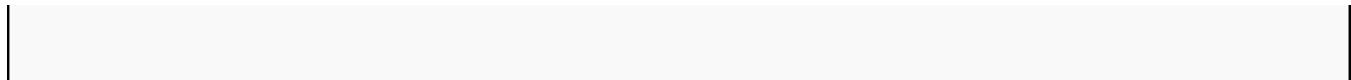
Model Codes and Restatements

Restatement Second, Torts § 843

The title to riparian lands runs to the thread of a contiguous stream.¹ An adjacent, riparian, or upland owner takes to the edge of public lakes at the ordinary low-water mark. A riparian owner's title, however, to the intervening shore between the ordinary high and ordinary low water marks is qualified or limited by and subject to the public's right of access and use for navigating, boating, fishing, fowling, and like public purposes.² The ownership of land abutting navigable waters, the "upland," extends to the high water mark on the shore, and the owner of the upland has certain rights to use the land between the high and low water mark and the waters extending from that mark to the point where the waters become navigable.³

Definition:

"Uplands" are lands bordering bodies of water but above the high water mark.⁴



Where title to an island bounded by the waters of a nonnavigable stream is in one owner and title to the land on the other shores opposite the island is in other owners, the same riparian rights appertain to the island as to the mainland.⁵

Generally, riparian rights do not extend or attach to subsequent additions to the original tract.⁶ Title to a newly created beach as the result of a beach renourishment project vests in the state where the project was publicly financed.⁷

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Footnotes

- 1 Anderson v. Cumpston, 258 Neb. 891, 606 N.W.2d 817 (2000).
- 2 South Dakota Wildlife Federation v. Water Management Bd., 382 N.W.2d 26 (S.D. 1986).
- 3 Port Clinton Associates v. Board of Selectmen of Town of Clinton, 217 Conn. 588, 587 A.2d 126 (1991).
- 4 State v. Kelley, 2001 WI 84, 244 Wis. 2d 777, 629 N.W.2d 601 (2001).
- 5 Obermiller v. Baasch, 284 Neb. 542, 823 N.W.2d 162 (2012).
- 6 Wright v. Buzzine, 180 Cal. App. 2d 426, 4 Cal. Rptr. 482, 79 A.L.R.2d 1047 (1st Dist. 1960).
- 7 Slavin v. Town of Oak Island, 160 N.C. App. 57, 584 S.E.2d 100 (2003).

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§ 48. Land not within watershed

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, Water Law  1225, 1229 to 1231, 1245 to 1262

Land that is not within the watershed of a river is not riparian to it although it may be part of an entire tract that does extend to the river.¹ Land is not riparian so as to entitle the owner thereof to the use of water from a stream if such land is not on the watershed of the portion of the stream where the taking is sought to be made although it is on the watershed of other portions of the stream.² The principal reasons for confining riparian rights to that part of lands bordering on the stream which is within the watershed are that, where the water is used on such land, it will, after such use, return to the stream, so far as it is not consumed, and that since the rainfall on such land feeds the stream, the land is in consequence entitled, so to speak, to the use of its waters.³

Where two streams unite, the correct rule seems to be that each is to be considered as a separate stream, with regard to lands abutting on them above the junction, and that land lying within the watershed of one stream above the junction is not to be considered as riparian to the other stream.⁴ The fact that the streams are of different size, or that both lie in one general watershed or drainage basin, does not affect the rule, nor is the rule changed by the additional fact that the two watersheds are separated merely by the summit or crown of a comparatively low tableland and not by a sharp or well-defined ridge, range of hills, or mountains.⁵

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Footnotes

1 Wright v. Buzzine, 180 Cal. App. 2d 426, 4 Cal. Rptr. 482, 79 A.L.R.2d 1047 (1st Dist. 1960); Sayles v. City of Mitchell, 60 S.D. 592, 245 N.W. 390 (1932).

2 Town of Gordonsville v. Zinn, 129 Va. 542, 106 S.E. 508, 14 A.L.R. 318 (1921).

3 Anaheim Union Water Co. v. Fuller, 150 Cal. 327, 88 P. 978 (1907).
4 Anaheim Union Water Co. v. Fuller, 150 Cal. 327, 88 P. 978 (1907).
5 Anaheim Union Water Co. v. Fuller, 150 Cal. 327, 88 P. 978 (1907).

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§ 49. Effect of highway or easement at or along water's edge

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West's Key Number Digest

West's Key Number Digest, [Water Law](#) 1225

Normally, the interposition of a fee title between upland and water destroys riparian rights or rather transfers them to the interposing owner.¹ Thus, land that is separated from water by a highway or street in which the public holds the fee is not riparian land² while land which is separated from water by a highway or street in which the landowner holds the fee, however, is riparian land.³ Where the roadway does not touch the water's edge, and leaves a substantial area of riparian land which can be and is occupied and used without hindrance from the so-called severance by the roadway, the separated land remains riparian land.⁴

If a public street or highway exists so that its boundary line and waters of a navigable lake or river meet, the riparian rights incident to the land composing the street belonged to the public.⁵

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Footnotes

¹ 2000 Baum Family Trust v. Babel, 488 Mich. 136, 793 N.W.2d 633 (2010).

For a definition of "uplands," see § 47.

² Thies v. Howland, 424 Mich. 282, 380 N.W.2d 463 (1985); Martinez v. Cook, 56 N.M. 343, 244 P.2d 134 (1952).

³ 2000 Baum Family Trust v. Babel, 488 Mich. 136, 793 N.W.2d 633 (2010).

⁴ City of Missoula v. Bakke, 121 Mont. 534, 198 P.2d 769 (1948).

⁵ Heise v. Village of Pewaukee, 92 Wis. 2d 333, 285 N.W.2d 859 (1979).

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§ 50. Waters to which rights attach

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West's Key Number Digest

West's Key Number Digest, Water Law 1255 to 1271

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Relative riparian or littoral rights respecting the removal of water from a natural, private, nonnavigable lake, 54 A.L.R.2d 1450

Forms

[Am. Jur. Pleading and Practice Forms, Waters § 65](#) (Complaint, petition, or declaration—By irrigation corporation—To enjoin riparian owner from irrigation of land from river—Water released from reservoir into river for irrigation use of corporation members)

[Am. Jur. Pleading and Practice Forms, Waters § 69](#) (Answer—Defense—Riparian owner's use of river water for domestic purposes only—River flow augmented by release of water from reservoir for use of irrigation corporation members)

While riparian or littoral rights in any or in certain classes of waters are not recognized in some jurisdictions,¹ it has frequently been stated that the principle on which riparian or littoral rights are founded is equally applicable to all bodies of water, whether

large or small, navigable or nonnavigable, tidal or nontidal, or whether flowing or not, and it is generally held that the character of the water is immaterial.² The right to use water on adjoining land applies as well to the water of a lake, pond, slough, or any natural body of water, by whatever name it may be called, as to a running stream.³ All the waters in a river below the highest line of its normal flow are riparian waters, including those gathered in holes or pools after the stream has ceased to flow.⁴ However, in the case of a nonnavigable lake or pond where the land under the water is owned by others, no littoral rights attach to the property bordering on the water, and an attempt to exercise any such rights by invading the water is as much a trespass as if an unauthorized entry were made upon the dry land of another.⁵

Where an artificial change of a permanent nature is produced in a natural stream, riparian rights generally attach to the stream in its artificial condition.⁶ If such change is made by joint or mutual action of the riparian proprietors, the rights and duties with respect to the artificial channel will be the same as though it were the natural one.⁷ A distinction is to be observed, however, in respect to riparian rights, between a natural stream flowing in an altered or artificial channel and an artificial stream.⁸ Where an artificial channel is dug to a natural watercourse, the artificial watercourse gives rise to no riparian rights.⁹

CUMULATIVE SUPPLEMENT

Cases:

Pond that was created artificially when a prior common owner dammed and dredged a muddy wetland, which caused surface waters to collect and create the pond, did not constitute a "natural watercourse" to which riparian rights would attach to abutting land. [Holton v. Ward, 303 Mich. App. 718, 847 N.W.2d 1 \(2014\)](#).

[END OF SUPPLEMENT]

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Footnotes

- 1 As to the extent of recognition of riparian and littoral rights, generally, see § 34.
- 2 [Bach v. Sарich, 74 Wash. 2d 575, 445 P.2d 648 \(1968\)](#) (nonnavigable lake); [Ames Lake Community Club v. State, 69 Wash. 2d 769, 420 P.2d 363 \(1966\)](#) (either navigable or nonnavigable lake).
- 3 Riparian rights are not restricted to navigable waters but, rather, are applicable to all waters which are subject to the protection and control of the state, including wetlands. [Application of Christenson, 417 N.W.2d 607 \(Minn. 1987\)](#).
- 4 [Florio v. State ex rel. Epperson, 119 So. 2d 305, 80 A.L.R.2d 1117 \(Fla. 2d DCA 1960\)](#) (lake).
- 5 [Humphreys-Mexia Co. v. Arseneaux, 116 Tex. 603, 297 S.W. 225, 53 A.L.R. 1147 \(1927\)](#).
- 6 [Shaffer v. Baylor's Lake Ass'n, 392 Pa. 493, 141 A.2d 583 \(1958\)](#).
- 7 [Taggart v. Town of Jaffrey, 75 N.H. 473, 76 A. 123 \(1910\)](#); [Cloyes v. Middlebury Elec. Co., 80 Vt. 109, 66 A. 1039 \(1907\)](#).
- 8 As to rights in respect to artificial conditions, generally, see § 45.
- 9 [Cloyes v. Middlebury Elec. Co., 80 Vt. 109, 66 A. 1039 \(1907\)](#).
- 10 [Drainage Dist. No. 1 of Lincoln County v. Suburban Irr. Dist., 139 Neb. 333, 297 N.W. 645 \(1941\)](#).
- 11 As to rights in artificial streams, see § 265.
- 12 [Thompson v. Enz, 379 Mich. 667, 154 N.W.2d 473 \(1967\)](#).

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6. Transfer, Enforcement, and Loss of Rights

§ 51. Transfer of rights

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West's Key Number Digest

West's Key Number Digest, Water Law  1268, 1275 to 1295, 1468

Forms

[Am. Jur. Legal Forms 2d §§ 260:22, 260:23 \(Provision in deed—Grant of riparian rights\)](#)

[Am. Jur. Legal Forms 2d §§ 260:24 to 260:28 \(Provision in deed—Reservation of riparian rights\)](#)

[Am. Jur. Legal Forms 2d § 260:29 \(Provision in dedication—Reservation of riparian rights\)](#)

Riparian rights may be transferred by grant and pass with the transfer of the land without any designation in the conveyance.¹ When waterfront property is conveyed, a presumption exists that the property is accompanied by the riparian rights to those waters.² One who acquires land abutting a body of water may acquire no more than is conveyed by the deed.³ The nature of the riparian rights necessary to fulfill the intent of a grant by definition depends upon the nature and extent of the grant itself.⁴

Where the interest conveyed by a deed is a right-of-way rather than a fee, such deed does not convey a riparian interest to the grantee nor sever riparian rights from the grantor's remaining lands.⁵

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Footnotes

1 Illinois Cent. R. Co. v. State of Illinois, 146 U.S. 387, 13 S. Ct. 110, 36 L. Ed. 1018 (1892).

2 Olde Severna Park Improvement Ass'n, Inc. v. Gunby, 402 Md. 317, 936 A.2d 365 (2007); Burwell's Bay
Improvement Ass'n v. Scott, 277 Va. 325, 672 S.E.2d 847 (2009); Bentley v. Director of Office of State
Lands and Investments, 2007 WY 94, 160 P.3d 1109 (Wyo. 2007).

3 Stoesser v. Shore Drive Partnership, 172 Wis. 2d 660, 494 N.W.2d 204 (1993).

4 Burwell's Bay Improvement Ass'n v. Scott, 277 Va. 325, 672 S.E.2d 847 (2009).

5 Murphy Slough Assn. v. Avila, 27 Cal. App. 3d 649, 104 Cal. Rptr. 136 (5th Dist. 1972).

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6. Transfer, Enforcement, and Loss of Rights

§ 52. Transfer of rights—Severance of rights from land

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West's Key Number Digest

West's Key Number Digest, Water Law  1279

Although riparian rights derive from the ownership of the upland from which the waters extend, such rights may, in many states, be separately alienated.¹ The riparian right can be separately conveyed by grant, condemnation, relinquishment or prescription.² Accordingly, riparian rights may be conveyed to a nonriparian owner.³

There is some authority, however, that riparian rights are not alienable, severable, divisible, or assignable from the lands which are bounded by, or include, a natural watercourse,⁴ and state legislation may prohibit conveyance of riparian rights separately from the land.⁵

Observation:

When previously severed riparian rights are acquired by an owner of the land from which they were severed, the two interests merge in such owner.⁶

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Footnotes

1 [Port Clinton Associates v. Board of Selectmen of Town of Clinton, 217 Conn. 588, 587 A.2d 126 \(1991\); Burwell's Bay Improvement Ass'n v. Scott, 277 Va. 325, 672 S.E.2d 847 \(2009\).](#)
A declaration of restrictive covenants did not require that dwelling lots in a development remain attached to their corresponding dock lots, and thus, the owner of the dwelling lots was free to transfer the dock lots. [Esbin v. Erickson, 987 So. 2d 198 \(Fla. 3d DCA 2008\).](#)
As to the transfer separately from the land of water rights, generally, see § 18.

2 [Mohawk Valley Water Authority v. State, 78 A.D.3d 1513, 910 N.Y.S.2d 780 \(4th Dep't 2010\), leave to appeal denied, 17 N.Y.3d 702, 929 N.Y.S.2d 93, 952 N.E.2d 1088 \(2011\).](#)

3 [Fitzstephens v. Watson, 218 Or. 185, 344 P.2d 221 \(1959\).](#)
Riparian rights can be conveyed to nonriparian owners by easement. [Stoesser v. Shore Drive Partnership, 172 Wis. 2d 660, 494 N.W.2d 204 \(1993\).](#)

4 [Thompson v. Enz, 379 Mich. 667, 154 N.W.2d 473 \(1967\).](#)

5 [Konneker v. Romano, 2010 WI 65, 326 Wis. 2d 268, 785 N.W.2d 432 \(2010\) \(prohibition not applicable to easement conveyed well before date of statute\).](#)

6 [Com., Marine Resources Commission v. Forbes, 214 Va. 109, 197 S.E.2d 195 \(1973\).](#)

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§ 53. Protection and enforcement of rights; remedies and actions

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West's Key Number Digest

West's Key Number Digest, Water Law  1532, 1533, 1538 to 1551

Forms

[Am. Jur. Pleading and Practice Forms, Waters § 38](#) (Answer—Defense—Defendant's right to water—As riparian owner)

[Am. Jur. Pleading and Practice Forms, Waters § 62](#) (Complaint, petition, or declaration—By riparian owner—Damages and injunction for trespass)

Riparian rights are considered appropriate subjects for legislative protection.¹ Interference with riparian rights is an actionable tort.² Any interference with a vested right to the use of water, whether from open streams, lakes, ponds, percolating or subterranean water, would entitle the party injured to damages, and an injunction would issue perpetually restraining any such interference.³

If an issue is raised by the pleadings, riparian adversaries are entitled to have the extent of their enjoyment of riparian rights upon a line of navigability determined and marked, the proper share of flats set apart, and the boundaries defined.⁴ In a case involving the doctrine of riparian rights, the giving of charges on tenancy in common and vertical ownership is inappropriate and confusing and constitutes reversible error.⁵

Footnotes

1 [Henry Ford & Son v. Little Falls Fibre Co.](#), 280 U.S. 369, 50 S. Ct. 140, 74 L. Ed. 483 (1930).
As to remedies for the protection and enforcement of water rights, generally, see §§ 26 to 32.
As to judicial control of the diversion and use of water, see § 69.

2 [Springer v. Joseph Schlitz Brewing Co.](#), 510 F.2d 468 (4th Cir. 1975).

3 [Clear Springs Foods, Inc. v. Spackman](#), 150 Idaho 790, 252 P.3d 71 (2011).

4 [Swanenburg v. Bland](#), 240 Va. 408, 397 S.E.2d 859 (1990).

5 [Stewart v. Bridges](#), 249 Ga. 626, 292 S.E.2d 702 (1982).

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§ 54. Loss or surrender of rights

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West's Key Number Digest

West's Key Number Digest, Water Law 1296 to 1299

A.L.R. Library

Loss of private easement by nonuse, 62 A.L.R.5th 219

At common law, a mere disuse of riparian rights does not destroy or suspend their existence¹ although the perpetuity of riparian rights is subject to impairment or destruction through adverse use by others or creation of an estoppel against the riparian proprietor.² The rights of a riparian owner exist whether exercised or not, and a dormant riparian right may be paramount to active appropriative rights.³ A riparian owner does not lose riparian rights merely because a portion of a river is under the control of a drainage district.⁴

A riparian proprietor may contract not to avail itself of the right to the use of the water abutting the land.⁵ However, a riparian owner, by agreeing to maintain a drainage ditch as a condition to its use of a river, does not thereby abandon whatever riparian rights it would otherwise have had but for the maintenance agreement.⁶

Observation:

Nonuse of a site for an unreasonable length of time will result in abandonment of a mill privilege.⁷

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Footnotes

- 1 Koch v. Aupperle, 274 Neb. 52, 737 N.W.2d 869 (2007).
- 2 Matter of Deadman Creek Drainage Basin in Spokane County, 103 Wash. 2d 686, 694 P.2d 1071 (1985).
- 3 In re Waters of Long Valley Creek Stream System, 25 Cal. 3d 339, 158 Cal. Rptr. 350, 599 P.2d 656 (1979).
- 4 Okaw Drainage Dist. of Champaign and Douglas County, Ill. v. National Distillers and Chemical Corp., 882 F.2d 1241 (7th Cir. 1989) (applying Illinois law).
- 5 Hite v. Town of Luray, 175 Va. 218, 8 S.E.2d 369 (1940).
- 6 Okaw Drainage Dist. of Champaign and Douglas County, Ill. v. National Distillers and Chemical Corp., 882 F.2d 1241 (7th Cir. 1989).
- 7 Brentwood Volunteer Fireman's Ass'n v. Musso, 159 N.H. 461, 986 A.2d 588 (2009) (nonuse for 76 years).

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Research References

West's Key Number Digest

West's Key Number Digest, Courts  8

West's Key Number Digest, Water Law  1007 to 1011, 1221, 1227 to 1245, 1256 to 1259, 1323, 1325, 1329, 1330 to 1333, 1338, 1339, 1341, 1364, 1369 to 1372, 1377, 1378, 1380, 1385 to 1390, 1392 to 1410, 1535, 1536, 1538 to 1542, 1547 to 1549, 1658, 1671, 1672, 1679, 1834, 1848, 1849, 1853, 1854

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A.L.R. Index, Dams

A.L.R. Index, Diversion of Water

A.L.R. Index, Riparian and Littoral Ownership and Rights

West's A.L.R. Digest, Courts  8

West's A.L.R. Digest, Water Law  1007 to 1011, 1221, 1227 to 1245, 1256 to 1259, 1323, 1325, 1329, 1330 to 1333, 1338, 1339, 1341, 1364, 1369 to 1372, 1377, 1378, 1380, 1385 to 1390, 1392 to 1410, 1535, 1536, 1538 to 1542, 1547 to 1549, 1658, 1671, 1672, 1679, 1834, 1848, 1849, 1853, 1854

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78 Am. Jur. 2d Waters § 55

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§ 55. Generally

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West's Key Number Digest

West's Key Number Digest, [Water Law](#) 1238, 1385

Model Codes and Restatements

[Restatement Second, Torts §§ 850 to 864](#)

The owner of land contiguous to a watercourse is entitled to have the stream flow by or through the owner's land undiminished in quantity and unpolluted in quality except that any riparian proprietor may make whatever use of the water that is reasonable with respect to the needs of other appropriators.¹ A riparian owner is privileged to make a reasonable use of the waters of a stream for any necessary and proper purpose incident to the land itself, and essential to its enjoyment,² which does not materially interfere with the rights of other riparian owners.³ Riparian owners have a right to enjoy the recreational and aesthetic advantages that are conferred on land adjoining a watercourse.⁴

Observation:

A statute which imposes an affirmative duty of care upon those who divert waters for their own use is but an enactment of the universal standard of due care under the circumstances, but this includes taking cognizance that the degree of care increases in proportion to the hazards anticipated.⁵

A riparian owner's right to use water flow is subject to the rule that a landowner cannot stop or divert the flow of a watercourse to the injury of a neighbor.⁶ Neither the State nor any individual has the right to divert the water to the riparian owner's injury.⁷ Accordingly, an upstream riparian owner may not divert water so that a river or stream completely bypasses the land of a downstream riparian owner.⁸ Likewise, one cannot negligently obstruct or divert the water of a natural course to the injury of another without liability.⁹

Practice Tip:

A diversion of a natural water course, even if it is without actual damage to a lower riparian owner, is an infringement of a legal right and imports damage.¹⁰

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Footnotes

- 1 [Colorado v. New Mexico](#), 459 U.S. 176, 103 S. Ct. 539, 74 L. Ed. 2d 348 (1982).
Under the common-law riparian doctrine, a person owning land bordering a stream has the right to reasonable and beneficial use of water on his or her land, but a riparian owner must share the right to use water with other riparian owners. [California Farm Bureau Federation v. State Water Resources Control Bd.](#), 51 Cal. 4th 421, 121 Cal. Rptr. 3d 37, 247 P.3d 112 (2011), as modified, (Apr. 20, 2011).
- 2 [Jones v. Oz-Ark-Val Poultry Co.](#), 228 Ark. 76, 306 S.W.2d 111 (1957); [Town of Purcellville v. Potts](#), 179 Va. 514, 19 S.E.2d 700, 141 A.L.R. 633 (1942).
For detailed discussion of the purposes for which water may be diverted and used, see §§ 60 to 67.
- 3 [Jones v. Oz-Ark-Val Poultry Co.](#), 228 Ark. 76, 306 S.W.2d 111 (1957).
- 4 [State Water Control Bd., Dept. of Environmental Quality v. Crutchfield](#), 265 Va. 416, 578 S.E.2d 762 (2003).
- 5 [Dougherty v. California-Pacific Utilities Co.](#), 546 P.2d 880, 91 A.L.R.3d 1057 (Utah 1976).
- 6 [Maddocks v. Giles](#), 1999 ME 63, 728 A.2d 150 (Me. 1999).
One may not alter the natural flow of water and injure the property of a neighbor. [Whorton v. Malone](#), 209 W. Va. 384, 549 S.E.2d 57 (2001).
- 7 [Portage Cty. Bd. of Commrs. v. Akron](#), 109 Ohio St. 3d 106, 2006-Ohio-954, 846 N.E.2d 478 (2006).
- 8 [Wisniewski v. Gemmill](#), 123 N.H. 701, 465 A.2d 875 (1983).
- 9 [Whorton v. Malone](#), 209 W. Va. 384, 549 S.E.2d 57 (2001).

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§ 56. Nature and extent of right

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West's Key Number Digest

West's Key Number Digest, Water Law 1228 to 1245, 1385, 1387

Forms

[Am. Jur. Pleading and Practice Forms, Waters § 12](#) (Checklist—Drafting a complaint to enjoin or recover damages for interference with right to appropriate water)

Model Codes and Restatements

[Restatement Second, Torts §§ 850 to 864](#)

The right of the owner of land abutting on a stream or body of water to use its water is not an easement but is an inherent right incident to the owner's property in the soil.¹ Nonconsensual limitations on such property rights not adjudicated and accompanied by due process must have existed since time immemorial to constitute legitimate limitations on the inherent rights of private waterfront property owners.² However, it is well settled, in accordance with the mutual or correlative nature of riparian or

littoral rights generally,³ that an abutting owner's right to take water from a stream or body of water is a qualified, and not an absolute, right of property.⁴ As between different riparian or littoral owners, each one is limited to a reasonable use of such waters, with due regard to the rights and necessities of all others interested.⁵ A riparian owner must share the right to use water with other riparian owners.⁶ The use by the owner must therefore be consistent with the rights of the others.⁷ However, since the use by each owner must be according to the owner's opportunity, a lower owner must submit to such loss as results from a reasonable use by an upper owner.⁸

Practice Tip:

Under the "reasonable use" rule relating to percolating waters, a landowner who obstructs or diverts such waters on the owner's own land, even to the detriment of a neighbor, is immune from liability if the interference was in the course of a lawful and reasonable use.⁹

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Footnotes

- 1 [Hite v. Town of Luray](#), 175 Va. 218, 8 S.E.2d 369 (1940).
A power company's right to divert and use a navigable river for power purposes was a recognized property right, a corporeal hereditament. [Niagara Mohawk Power Corp. v. U. S.](#), 207 Ct. Cl. 576, 525 F.2d 1380 (1975).
- 2 [Severance v. Patterson](#), 370 S.W.3d 705 (Tex. 2012).
- 3 § 36.
- 4 [Stratton v. Mt. Hermon Boys' School](#), 216 Mass. 83, 103 N.E. 87 (1913); [Scranton Gas & Water Co. v. Delaware, L. & W. R. Co.](#), 240 Pa. 604, 88 A. 24 (1913).
The right of the adjacent proprietor to the water of the stream is a usufructuary right, appurtenant to the freehold, not an absolute property. [Portage Cty. Bd. of Commrs. v. Akron](#), 109 Ohio St. 3d 106, 2006-Ohio-954, 846 N.E.2d 478 (2006).
- 5 [U. S. v. Fallbrook Public Utility Dist.](#), 165 F. Supp. 806 (S.D. Cal. 1958) (applying law of California); [Bollinger v. Henry](#), 375 S.W.2d 161 (Mo. 1964).
At common law, each riparian owner has the right, subject to the reasonable use doctrine, to use water from a natural waterway for the purpose of irrigating the owner's lands. [Omernick v. Department of Natural Resources](#), 71 Wis. 2d 370, 238 N.W.2d 114 (1976).
- 6 [California Farm Bureau Federation v. State Water Resources Control Bd.](#), 51 Cal. 4th 421, 121 Cal. Rptr. 3d 37, 247 P.3d 112 (2011), as modified, (Apr. 20, 2011).
- 7 [Martin v. British Am. Oil Producing Co.](#), 1940 OK 218, 187 Okla. 193, 102 P.2d 124 (1940).
Any person having a legal right to surface or groundwater may take only such amount as the person reasonably needs for beneficial purposes. [City of Barstow v. Mojave Water Agency](#), 23 Cal. 4th 1224, 99 Cal. Rptr. 2d 294, 5 P.3d 853 (2000).
- 8 [Strobel v. Kerr Salt Co.](#), 164 N.Y. 303, 58 N.E. 142 (1900).
- 9 [Ball v. U.S.](#), 1 Cl. Ct. 180 (1982).

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a. Rights and Liabilities

§ 57. Reasonableness of use

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, Water Law  1238

Model Codes and Restatements

Restatement Second, Torts §§ 850 to 864

No rule can be laid down as to what is a reasonable use which will, without variation or qualification, apply to the facts of every case, but the reasonableness of the use depends on the circumstances of the particular case.¹ Reasonableness of use is a question of fact.² In determining what is a reasonable use of waters, courts may consider, among other things, the purpose of the use; the extent, duration, necessity, and application of the use; and the nature and size of the stream.³

The private right to divert and use the waters of a stream is subject not only to the rights of lower owners but also to the initial limitation that it may not substantially diminish one of the great foundations of public welfare and health.⁴

CUMULATIVE SUPPLEMENT

Cases:

Although riparian users must share with other riparian users on the watercourse, there is no predetermined limit on the amount of water an individual riparian user may divert, so long as the uses to which the diverted water is put are riparian, beneficial, and reasonable. [Millview County Water District v. State Water Resources Control Board](#), 229 Cal. App. 4th 879, 177 Cal. Rptr. 3d 735 (1st Dist. 2014).

[END OF SUPPLEMENT]

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Footnotes

1 Crum v. Craig, 2010 Ark. App. 531, 379 S.W.3d 71 (2010); Price v. High Shoals Mfg. Co., 132 Ga. 246, 64 S.E. 87 (1909); Stratton v. Mt. Hermon Boys' School, 216 Mass. 83, 103 N.E. 87 (1913).
As to the requirement for reasonableness of use, generally, see § 37.

2 U. S. v. Fallbrook Public Utility Dist., 165 F. Supp. 806 (S.D. Cal. 1958) (applying California law); Pion v. Bean, 176 Vt. 1, 2003 VT 79, 833 A.2d 1248 (2003).

3 Crum v. Craig, 2010 Ark. App. 531, 379 S.W.3d 71 (2010).

4 Hudson County Water Co. v. McCarter, 209 U.S. 349, 28 S. Ct. 529, 52 L. Ed. 828 (1908).

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§ 58. Appropriative rights vs. riparian rights

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, Water Law  1228 to 1245, 1385, 1387

Forms

[Am. Jur. Pleading and Practice Forms, Waters § 37](#) (Answer—Defense—Defendant's right to water—As riparian owner)

[Am. Jur. Pleading and Practice Forms, Waters § 50](#) (Judgment or decree—Apportioning waters of stream between appropriator and riparian owner)

A constitutional article providing for the right to divert unappropriated waters does not do away with riparian rights.¹ Some states recognize a modified common-law riparian right to the reasonable use of a stream, and the statutory right to appropriate stream water coexists with, but does not preempt or abrogate, a riparian owner's common-law right.² Some states operate under a dual or hybrid system of water rights which recognizes both doctrines of riparian rights and appropriation rights.³ While the riparian doctrine confers upon the owner of land contiguous to a watercourse the right to a reasonable and beneficial use of the water on the owner's land, the appropriation doctrine contemplates the diversion of water and applies to any taking of water for other than riparian or overlying uses, but both riparian and appropriative rights are usufructuary only and confer no right of private ownership in a water course.⁴

Distinction:

Appropriative rights do not depend on land ownership and are acquired and maintained by actual use while riparian rights originate from land ownership and remain vested even if unexercised. Appropriative rights are fixed in quantity while riparian rights are variable depending on stream flow and subject to the reasonable uses of others.⁵

CUMULATIVE SUPPLEMENT

Cases:

Dual system of water rights distinguishes between the rights of "riparian users," those who possess water rights by virtue of owning the land by or through which flowing water passes, and "appropriators," those who hold the right to divert such water for use on noncontiguous lands. [Siskiyou County Farm Bureau v. Department of Fish and Wildlife, 237 Cal. App. 4th 411, 188 Cal. Rptr. 3d 141 \(3d Dist. 2015\)](#), as modified on denial of reh'g, (June 26, 2015).

[END OF SUPPLEMENT]

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Footnotes

- 1 [In re Application A-16642, 236 Neb. 671, 463 N.W.2d 591 \(1990\)](#).
As to the appropriation of water, see §§ 355 to 381.
Specifically, as to the conflict between riparian rights and appropriative rights, see § 374.
- 2 [Franco-American Charolaise, Ltd. v. Oklahoma Water Resources Bd., 1990 OK 44, 855 P.2d 568 \(Okla. 1990\)](#), reissued, (Apr. 13, 1993).
- 3 [Westland Water Dist. v. U.S., 153 F. Supp. 2d 1133 \(E.D. Cal. 2001\)](#), aff'd, [337 F.3d 1092 \(9th Cir. 2003\)](#) (applying California law).
- 4 [People v. Shirokow, 26 Cal. 3d 301, 162 Cal. Rptr. 30, 605 P.2d 859 \(1980\)](#).
- 5 [Colorado v. New Mexico, 459 U.S. 176, 103 S. Ct. 539, 74 L. Ed. 2d 348 \(1982\)](#).

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§ 59. Source of diverted water

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, Water Law 1007 to 1011

While water is flowing naturally in the channel of a stream or other source of supply, it is property common to everybody; everyone has equal rights in it, subject to the same rights in others and to the special rights to diversion and use recognized by law.¹ Once that water arrives upon a given property, that property owner is entitled to take only such steps as are reasonable in diverting it notwithstanding whether the water comes from a cloud, spring, or an upstream neighbor.² Where surface water and groundwater can be demonstrated to be physically interrelated as parts of a single system, established surface water rights may be protected against diversions that injure those rights whether the diversions involve surface water or groundwater.³

Observation:

Permafrost is a form of groundwater, and the same doctrines that apply to the drainage of unwanted surface water are applicable to the drainage of groundwater.⁴

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Footnotes

- 1 Adams v. Portage Irr., Reservoir & Power Co., 95 Utah 1, 72 P.2d 648 (1937).
- 2 Whorton v. Malone, 209 W. Va. 384, 549 S.E.2d 57 (2001).
As to what constitutes reasonable use, see §§ 37, 57.
- 3 Reppun v. Board of Water Supply, 65 Haw. 531, 656 P.2d 57 (1982).
- 4 Braham v. Fuller, 728 P.2d 641 (Alaska 1986).

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1. In General

b. Purpose and Use of Water

§ 60. Generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, Water Law  1229 to 1245, 1256 to 1259, 1385 to 1387

A riparian proprietor may divert and use the waters of the stream for any legitimate purpose the proprietor may desire so long as there is no interference with the rights of other persons.¹ When the rights of others are adversely affected, however, the use by a riparian owner is generally limited to such purposes as are ordinarily incident to the use and enjoyment of the owner's riparian premises.² A riparian owner may use the water for ordinary domestic purposes³ even though such use may in some degree lessen the volume of the stream or affect the purity of the water.⁴

The rights associated with riparian ownership generally include: (1) the right of access to navigable water; (2) the right to build a pier out to the line of navigability; (3) the right to accretions; and (4) the right to a reasonable use of the water for general purposes, such as boating and domestic use.⁵

It is generally agreed that a riparian owner cannot take and use the water from the stream for a nonriparian use⁶ and that riparian owners are entitled to protection against a nonriparian use by another riparian owner.⁷

Observation:

A distinction is to be noted between the upper and lower riparian proprietor. While an upper riparian owner may obtain prescriptive rights against a lower riparian owner by invading the latter's riparian rights, the converse does not follow. Since an upper proprietor's

interest in the water ceases after it passes its lands, no act of the lower proprietor can invade its rights, and therefore, a lower proprietor cannot gain prescriptive rights as to the use of the water as against the upper proprietor. Prescription does not run upstream.⁸

One of the fundamental characteristics of the riparian right is that it is a right to use the water as it is naturally available.⁹ While the temporary impoundment of water for the purpose of providing a head for the generation of power is permitted under the riparian right, the artificial storage of water for future use, whether cyclic or seasonal, is not a proper exercise of the riparian right but is instead an appropriation of the water.¹⁰

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Footnotes

- 1 Indian Refining Co. v. Ambraw River Drainage Dist., 1 F. Supp. 937 (E.D. Ill. 1932); Town of Purcellville v. Potts, 179 Va. 514, 19 S.E.2d 700, 141 A.L.R. 633 (1942).
- 2 Scranton Gas & Water Co. v. Delaware, L. & W. R. Co., 240 Pa. 604, 88 A. 24 (1913).
- 3 Bollinger v. Henry, 375 S.W.2d 161 (Mo. 1964).
- 4 Harvey Realty Co. v. Borough of Wallingford, 111 Conn. 352, 150 A. 60 (1930).
- 5 Center Townhouse Corp. v. City of Mishawaka, 882 N.E.2d 762 (Ind. Ct. App. 2008).
- 6 Stanton v. Trustees of St. Joseph's College, 254 A.2d 597 (Me. 1969); Kennebunk, Kennebunkport and Wells Water Dist. v. Maine Turnpike Authority, 147 Me. 149, 84 A.2d 433 (1951).
- 7 Stanton v. Trustees of St. Joseph's College, 254 A.2d 597 (Me. 1969).
- 8 § 387.
- 9 U. S. v. Fallbrook Public Utility Dist., 165 F. Supp. 806 (S.D. Cal. 1958) (applying California law).
- 10 U. S. v. Fallbrook Public Utility Dist., 165 F. Supp. 806 (S.D. Cal. 1958) (applying California law).

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b. Purpose and Use of Water

§ 61. Artificial or extraordinary purposes

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, Water Law  1229 to 1245, 1256 to 1259, 1385 to 1387

By the common law, a distinction was recognized between the right of a riparian owner to the ordinary use of the water for supplying the owner's natural wants for domestic uses and for cattle and the right to its use for artificial wants, such as pleasure grounds or manufacturing. Although, in the exercise of this right, the superior proprietor might make any reasonable use of the flow and water of the stream for all domestic purposes, irrespective of any diminution caused thereby to the injury of an inferior proprietor, the owner could not exercise the right for any extraordinary use that would interfere with the rights of the inferior proprietors.¹ However, the original application of the riparian doctrine which accorded the riparian landowner the right to have a stream maintained at its normal level, subject to use for strictly domestic purposes, was later relaxed so as to permit a greater use of the water.² It is now generally recognized that a riparian proprietor has the right to make an extraordinary or artificial use of the water provided that such use does not materially interfere with the common right of others.³

In determining whether an artificial use of the water of a stream is reasonable or not, it is necessary to consider what the use is for; its extent, duration, necessity, and application; the nature and size of the stream; and the several uses to which it is put, the extent of the injury to one proprietor and the benefit to the other, and all other facts which may bear upon the reasonableness of the use.⁴

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Footnotes

1 Wiggins v. Muscupiabe Land & Water Co., 113 Cal. 182, 45 P. 160 (1896); Nielson v. Sponer, 46 Wash. 14, 89 P. 155 (1907).
Artificial uses are those which merely increase one's comfort and prosperity and which do not rank as essential to the person's existence, such as commercial profit and recreation. *Pierce v. Riley*, 35 Mich. App. 122, 192 N.W.2d 366 (1971).

2 Harris v. Brooks, 225 Ark. 436, 283 S.W.2d 129, 54 A.L.R.2d 1440 (1955).

3 Seneca Consol. Gold Mines Co. v. Great Western Power Co. of California, 209 Cal. 206, 287 P. 93, 70 A.L.R. 210 (1930); Fall River Valley Irr. Dist. v. Mt. Shasta Power Corp., 202 Cal. 56, 259 P. 444, 56 A.L.R. 264 (1927).

4 Harris v. Brooks, 225 Ark. 436, 283 S.W.2d 129, 54 A.L.R.2d 1440 (1955).

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§ 62. Taking of water for distribution or sale

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, Water Law  1229 to 1245, 1256 to 1259, 1385 to 1387, 1392 to 1410

It has frequently been stated that a riparian owner has no right as such to divert water from a stream in order to make merchandise of it.¹ The use of water for public distribution is a nonriparian use,² and a municipal corporation, although a riparian owner, is precluded from diverting the waters of a natural stream for the purpose of supplying water to its inhabitants without compensating other riparian owners for the injury done them or acquiring the right to use the water by condemnation proceedings.³ According to some authorities, however, a riparian proprietor may divert water from a stream for the purpose of sale for use on either riparian or nonriparian land provided that the rights of other riparian owners are not thereby interfered with.⁴

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Footnotes

- 1 [Miller v. Bay Cities Water Co.](#), 157 Cal. 256, 107 P. 115 (1910); [Scranton Gas & Water Co. v. Delaware, L. & W. R. Co.](#), 240 Pa. 604, 88 A. 24 (1913).
- 2 [Kennebunk, Kennebunkport and Wells Water Dist. v. Maine Turnpike Authority](#), 147 Me. 149, 84 A.2d 433 (1951).
- 3 [Am. Jur. 2d, Waterworks and Water Companies](#) § 25.
A city's right to sell water to nonresidents of the city emanated from its status as a riparian owner, not a 1911 legislative grant restricting use to the city and its inhabitants. [Portage Cty. Bd. of Commrs. v. Akron](#), 109 Ohio St. 3d 106, 2006-Ohio-954, 846 N.E.2d 478 (2006).

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§ 63. Priority or preference as between particular purposes

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West's Key Number Digest

West's Key Number Digest, Water Law 1229 to 1245, 1256 to 1259, 1385 to 1387, 1392 to 1410

A.L.R. Library

Relative riparian or littoral rights respecting the removal of water from a natural, private, nonnavigable lake, 54 A.L.R.2d 1450

Although it has been said that there is no priority among riparian proprietors utilizing the water supply,¹ the use of water for domestic purposes is often accorded a preference over the demands of irrigation and manufacturing.² Thus, users for domestic purposes enjoy a preferred position with respect to all users other than a correlative one.³ In the case of correlative rights, the fact that one interest may be superior to another does not extinguish the inferior interest but merely establishes the priority of the superior use.⁴

Aside from the use of water from a stream or lake for strictly domestic purposes, all other lawful uses of water are equal.⁵ It has been said that while users for natural or domestic purposes enjoy a preference over users for artificial purposes,⁶ the latter occupy a correlative status with the other riparian owners in the exercise of their rights for artificial purposes.⁷ However, when one lawful use of water interferes with or detracts from another lawful use, a question arises as to whether, under all the facts

and circumstances of that particular case, the interfering use should be declared unreasonable and as such enjoined or whether a reasonable and equitable adjustment should be made, having due regard to the reasonable rights of each.⁸ In applying the reasonable use theory with respect to the conflicting uses of water in a stream or lake by riparian owners, the determination of the unreasonableness of a particular use should not be an unreasoned and intuitive conclusion but rather an evaluation of the conflicting interests.⁹

A preference between conflicting uses may be established by statute.¹⁰

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Footnotes

- 1 [Koch v. Aupperle](#), 274 Neb. 52, 737 N.W.2d 869 (2007).
As to priorities among appropriators, see § 372.
- 2 [Taylor v. Tampa Coal Co.](#), 46 So. 2d 392 (Fla. 1950); [Tunison v. Harper](#), 286 Ga. 687, 690 S.E.2d 819 (2010).
The right to use water from a stream or lake for strictly domestic purposes, such as for household use, is superior to many other uses of water, such as for fishing, recreation, and irrigation. [Harris v. Brooks](#), 225 Ark. 436, 283 S.W.2d 129, 54 A.L.R.2d 1440 (1955).
- 3 [Pierce v. Riley](#), 35 Mich. App. 122, 192 N.W.2d 366 (1971).
- 4 [Wagoner County Rural Water Dist. No. 2 v. Grand River Dam Authority](#), 2010 OK CIV APP 95, 241 P.3d 1132 (Div. 2 2010), cert. denied, 131 S. Ct. 1045, 178 L. Ed. 2d 864 (2011).
As to the correlative or mutual nature of rights, see § 36.
- 5 [Harris v. Brooks](#), 225 Ark. 436, 283 S.W.2d 129, 54 A.L.R.2d 1440 (1955); [Taylor v. Tampa Coal Co.](#), 46 So. 2d 392 (Fla. 1950); [Tunison v. Harper](#), 286 Ga. 687, 690 S.E.2d 819 (2010).
- 6 Generally, as to the use of water for artificial or extraordinary purposes, see § 61.
- 7 [Pierce v. Riley](#), 35 Mich. App. 122, 192 N.W.2d 366 (1971).
- 8 [Harris v. Brooks](#), 225 Ark. 436, 283 S.W.2d 129, 54 A.L.R.2d 1440 (1955).
- 9 [Harris v. Brooks](#), 225 Ark. 436, 283 S.W.2d 129, 54 A.L.R.2d 1440 (1955).
- 10 [Brown v. Ellingson](#), 224 So. 2d 391 (Fla. 2d DCA 1969).

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§ 64. Use on nonriparian land or outside the watershed

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West's Key Number Digest

West's Key Number Digest, Water Law  1237

Model Codes and Restatements

Restatement Second, Torts § 855

Numerous decisions dealing with the rights of riparian ownership have laid down the rule that such rights extend only to use upon and in connection with an estate which adjoins the stream and that no legal right exists in a riparian owner for the use of the water beyond the owner's riparian land, and any such use is an infringement of the rights of the lower riparian proprietors, who are thereby deprived of the flow.¹ Under this view, land outside the watershed of the stream from which the diversion is made is nonriparian land, and the diversion of water to, and its use on, nonriparian land constitutes an appropriation of the water and is not within the riparian right.² Some authorities, however, take the view that the rule that water cannot be used in connection with nonriparian lands is subject to the modification that the diversion, if for a use reasonable in itself, must cause actual perceptible damage to the present or potential enjoyment of the property of the lower riparian proprietor before a cause of action arises in the lower riparian proprietor's favor.³ The question in such a case is said to be not whether the diversion, being for a legitimate use, is in quantity such as is reasonable, having regard to all the circumstances, as it is in cases of distinctly riparian uses, but only whether it causes actual damage to the person complaining.⁴ According to this view, a proprietor may make any reasonable use of the water of the stream in connection with the proprietor's riparian estate and for lawful purposes

within the watershed provided the proprietor leaves the current diminished by no more than is reasonable, having regard for the like right to enjoy the common property by other riparian owners.⁵ If the proprietor diverts the water to a point outside the watershed or upon a disconnected estate, the only question is whether there is actual injury to the lower estate for any present or future reasonable use.⁶

In jurisdictions wherein a riparian owner cannot use waters on nonriparian lands, the owner cannot confer upon another person the right to divert water from a stream to use on nonriparian lands to the injury of a lower proprietor.⁷ Further, although nonriparian owners may acquire riparian rights by purchase, when they do so, they acquire only the rights of riparian owners and will be chargeable for any unlawful diversion of the water to the injury of other owners.⁸

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Footnotes

1 U. S. v. Fallbrook Public Utility Dist., 165 F. Supp. 806 (S.D. Cal. 1958) (applying law of California); *Town of Purcellville v. Potts*, 179 Va. 514, 19 S.E.2d 700, 141 A.L.R. 633 (1942).
The doctrine of beneficial use precludes the application of waters saved by water conservation practices to lands other than those to which the water was originally appurtenant. *Salt River Val. Water Users' Ass'n v. Kovacovich*, 3 Ariz. App. 28, 411 P.2d 201 (1966).

2 U. S. v. Fallbrook Public Utility Dist., 165 F. Supp. 806 (S.D. Cal. 1958) (applying law of California).

3 *Stanton v. Trustees of St. Joseph's College*, 254 A.2d 597 (Me. 1969).

4 *Stratton v. Mt. Hermon Boys' School*, 216 Mass. 83, 103 N.E. 87 (1913).

5 *Stratton v. Mt. Hermon Boys' School*, 216 Mass. 83, 103 N.E. 87 (1913).

6 *Stratton v. Mt. Hermon Boys' School*, 216 Mass. 83, 103 N.E. 87 (1913).

7 *Mt. Shasta Power Corp. v. McArthur*, 109 Cal. App. 171, 292 P. 549 (3d Dist. 1930); *Town of Gordonsville v. Zinn*, 129 Va. 542, 106 S.E. 508, 14 A.L.R. 318 (1921).

8 *Wagner v. Purity Water Co.*, 241 Pa. 328, 88 A. 484 (1913).

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§ 65. Amount or quantity of water

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West's Key Number Digest

West's Key Number Digest, [Water Law](#) 1238

A.L.R. Library

Relative riparian or littoral rights respecting the removal of water from a natural, private, nonnavigable lake, 54 A.L.R.2d 1450

Forms

[Am. Jur. Pleading and Practice Forms, Waters § 60](#) (Complaint, petition, or declaration—To enjoin diversion of unreasonable quantity of water)

Each of the riparian proprietors on a stream or other body of water has the right to use a reasonable quantity of the water.¹ Diminution in the quantity of a watercourse is permitted if it is consistent with the beneficial use of the land,² but material diminishment of the quantity is not permitted.³ The amount of water which may be diverted, except for certain preferential

uses, depends on the condition and circumstances of other proprietors on the stream.⁴ All rights to the use of water, including the riparian right, are limited to such an amount of water as is reasonably required for the beneficial use to be served, and such rights do not extend to the waste, unreasonable use, or unreasonable method of diversion of water.⁵

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Footnotes

- 1 Westlands Water Dist. v. U.S., 337 F.3d 1092 (9th Cir. 2003) (applying California law); Garbarino v. Noce, 181 Cal. 125, 183 P. 532, 6 A.L.R. 1433 (1919).
- 2 Freeman v. Blue Ridge Paper Products, Inc., 229 S.W.3d 694 (Tenn. Ct. App. 2007) (applying North Carolina law).
- 3 In re Flood Litigation, 216 W. Va. 534, 607 S.E.2d 863 (2004).
- 4 Harrell v. City of Conway, 224 Ark. 100, 271 S.W.2d 924 (1954).
As to priority or preference as between particular purposes, see § 63.
- 5 U. S. v. Fallbrook Public Utility Dist., 165 F. Supp. 806 (S.D. Cal. 1958) (applying California law).

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§ 66. Disposition of diverted water; return to natural channel

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, Water Law  1229 to 1245, 1256 to 1259, 1385 to 1390

Forms

[Am. Jur. Pleading and Practice Forms, Waters § 291](#) (Judgment or decree—Enjoining injurious discharge of waste irrigation water)

An upstream riparian owner may divert water from its channel for any lawful use so long as the upstream owner returns it to the channel above the land of the next downstream riparian owner in substantially the same condition as when it reached the upstream riparian owner's land.¹ The obstruction or diversion of a natural watercourse which restricts the natural flow of the water of the stream and causes such water to overflow, accumulate, and stand upon the land through which such watercourse passes is an infringement of a property right of the landowner and imports damage to such land.²

Where a municipality imports water from another watershed into a stream, in the absence of an agreement to the contrary, after the original use of such water, it may reuse, make a successive use of, and after use make disposition of such water.³

CUMULATIVE SUPPLEMENT

Cases:

If a landowner builds a structure in a natural watercourse to provide for the water's passage through the landowner's property, that landowner does owe a duty to adjoining landowners to maintain the construction so that water will not be collected or damage another's property; however, this duty is owed only to other landowners, not to guests of adjoining landowners, and is used only to refer to damages caused to another's property. [Hodson v. Taylor, 290 Neb. 348, 860 N.W.2d 162 \(2015\)](#).

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Footnotes

- 1 [Wisniewski v. Gemmill, 123 N.H. 701, 465 A.2d 875 \(1983\)](#).
- 2 [In re Flood Litigation, 216 W. Va. 534, 607 S.E.2d 863 \(2004\)](#).
- 3 [City and County of Denver By and Through Bd. of Water Com'rs v. Fulton Irrigating Ditch Co., 179 Colo. 47, 506 P.2d 144 \(1972\)](#).

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§ 67. Discontinuance of diversion

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, Water Law 1323, 1390

Ordinarily, one who, in the exercise of a riparian or appropriatory right, diverts water from a natural stream or body for a temporary or specific purpose has the right to discontinue such diversion at the person's pleasure and allow the water to continue in its natural flow.¹ It is usually considered that the person is under no obligation to maintain, for the benefit of other persons, an artificial condition created by such diversion.² However, the doctrine that the creation of artificial conditions in respect of natural streams or bodies of water may give rise to reciprocal rights in respect of such conditions, which prevails in some jurisdictions,³ has been applied in some cases so as to preclude the discontinuance of the diversion, and the consequent restoration of the water to its original course or condition, as against other persons who have justifiably acted upon the supposition that the artificial condition created by the diversion would be permanent and who would sustain injury by the restoration of the original conditions.⁴

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Footnotes

¹ *Mitchell Drainage Dist. v. Farmers' Irr. Dist.*, 127 Neb. 484, 256 N.W. 15 (1934).

² *Mitchell Drainage Dist. v. Farmers' Irr. Dist.*, 127 Neb. 484, 256 N.W. 15 (1934).

³ § 8.

⁴ *Kray v. Muggli*, 84 Minn. 90, 86 N.W. 882 (1901).

For application of doctrine in the case of lakes and ponds, see § 132.

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c. Regulation and Enforcement

§ 68. Governmental control and regulation

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West's Key Number Digest

West's Key Number Digest, Water Law  1221, 1227

A state has the power to control and conserve the use of its water resources for the benefit of all of its inhabitants.¹ Thus, the State has the power, within constitutional limits, to regulate the diversion and use of its streams and other natural bodies of water in the public interest, and it is its duty to exercise such power.² The scope of riparian rights is determined by the law of the sovereign having authority over the body of water in question.³ Governmental regulations relating to the subject are inoperative, however, insofar as their application would interfere with vested rights.⁴

While the courts agree on the existence of the power, there is a divergence of views as to its source, and by some authorities, it has been based on the principle that the title to the public waters of the state is vested in the State for the use and benefit of all the citizens of the state, under such rules and regulations as may be prescribed from time to time by the lawmaking power of the state.⁵ Other courts have held that the State as quasi-sovereign and representative of the interests of the public has standing in court to protect the water within its territory, irrespective of the assent or dissent of the private owners of the land most immediately concerned,⁶ and that the private right to appropriate is subject not only to the rights of lower owners but also to the initial limitation that it may not substantially diminish one of the great foundations of public welfare and health.⁷

The diversion of water from navigable streams or bodies is subject to the paramount authority and control of the federal government in respect of commerce and navigation.⁸

CUMULATIVE SUPPLEMENT

Cases:

Statute requiring notification when agricultural entity planned to substantially divert water from river or stream did not effect a taking under the Fifth Amendment; statute did not impair agricultural users' vested water rights in any way, as statute was merely a notification statute, and statute helped ensure continued beneficial use of state's water. [U.S. Const. Amend. 5](#); [Cal. Fish & Game Code § 1602](#). *Siskiyou County Farm Bureau v. Department of Fish and Wildlife*, 237 Cal. App. 4th 411, 188 Cal. Rptr. 3d 141 (3d Dist. 2015), as modified on denial of reh'g, (June 26, 2015).

The State Water Resources Control Board's authority to prevent unreasonable or wasteful use of water extends to all users, regardless of the basis under which the users' water rights are held. [Cal. Water Code § 275. Light v. State Water Resources Control Board, 226 Cal. App. 4th 1463, 173 Cal. Rptr. 3d 200 \(1st Dist. 2014\)](#), as modified on denial of reh'g, (July 11, 2014).

Ground Water Commission had jurisdiction to make initial determination as to whether controversy regarding whether water rights applicant could appropriate certain water implicated designated ground water, where there was evidence that water at issue was designated ground water. *Colo. Rev. Stat. Ann. § 37-90-111(1)(a). In Matter of Water Rights*, 2015 CO 64, 361 P.3d 392 (Colo. 2015).

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Footnotes

operation of a high-capacity well that was authorized by the DNR under statute. [Lake Beulah Management Dist. v. Village of East Troy](#), 2011 WI 55, 335 Wis. 2d 92, 799 N.W.2d 787 (2011).

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§ 69. Judicial control; apportionment

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West's Key Number Digest

West's Key Number Digest, Water Law  1325, 1364, 1392, 1535

Forms

[Am. Jur. Pleading and Practice Forms, Waters § 50](#) (Judgment or decree—Apportioning waters of stream between appropriator and riparian owner)

[Am. Jur. Pleading and Practice Forms, Waters § 74](#) (Judgment or decree—Apportioning waters of stream among riparian owners—Awarding fractional amount of flow)

[Am. Jur. Pleading and Practice Forms, Waters § 75](#) (Judgment or decree—Apportioning waters of stream among riparian owners—Awarding specified quantity of water for irrigation)

Courts have jurisdiction to adjudicate common-law claims involving impairment of water rights,¹ and they have ample power to ascertain the relative rights of riparian owners in respect of the diversion and use of water and to regulate the manner of using the water.² For the protection of the rights of the several riparian proprietors, a court of equity, in a proper case, may apportion the flow of the stream, after the natural wants of the proprietors have been satisfied, in such a manner as may seem equitable and just under the circumstances.³

Footnotes

1 Koch v. Aupperle, 274 Neb. 52, 737 N.W.2d 869 (2007).
2 Watkins Land Co. v. Clements, 98 Tex. 578, 86 S.W. 733 (1905).
3 As to conflicting uses, see § 63.
Hidalgo County Water Imp. Dist. No. Two v. Cameron County Water Control & Imp. Dist. No. Five, 250
S.W.2d 941 (Tex. Civ. App. San Antonio 1952).

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§ 70. Generally

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West's Key Number Digest

West's Key Number Digest, [Water Law](#) 1325, 1364, 1392, 1535

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[Liability for diversion of surface water by raising surface level of land, 88 A.L.R.4th 891](#)

[Liability for overflow of water confined or diverted for public power purposes, 91 A.L.R.3d 1065](#)

Model Codes and Restatements

[Restatement Second, Torts §§ 850 to 864](#)

A riparian owner whose rights have been infringed by an unlawful diversion of a river may bring an action for damages.¹ Where the plaintiff's use of groundwater, whether it be for consumption or for support, is interfered with by the defendant's diversion of that water, incidental to some use of the defendant's own land, the rules of liability developed by the law of nuisance will apply.²

Where the public waters of the state are owned by the State as trustee for the people, the State is authorized to bring suit to protect the public waters against unlawful use or to bring any other action if required by the State's pecuniary interests or the general welfare.³

CUMULATIVE SUPPLEMENT

Cases:

Surface water rights owner's claim that legislative amendment to the statutory process for challenging the designation of a groundwater basin was unconstitutional as applied was not yet ripe for adjudication in the water court, when the Groundwater Commission had not yet made an initial determination as to whether the designated groundwater basin was hydrologically connected and causing injury to the owner's surface water rights. [Colo. Rev. Stat. Ann. §§ 37-90-111\(1\)\(a\), 37-92-203\(1\)](#). [Jim Hutton Educational Foundation v. Rein](#), 2018 CO 38M, 418 P.3d 1156 (Colo. 2018), as modified on denial of reh'g, (June 11, 2018).

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Footnotes

- 1 [Wisniewski v. Gemmill](#), 123 N.H. 701, 465 A.2d 875 (1983).
As to remedies and actions in suits between states, see §§ 82 to 85.
- 2 [Henderson v. Wade Sand and Gravel Co., Inc.](#), 388 So. 2d 900 (Ala. 1980).
As to wrongful diversion as nuisance, see § 55.
As to remedies for nuisances in respect of waters and water rights, see § 410.
- 3 [Bliss, State ex rel. v. Dority](#), 55 N.M. 12, 225 P.2d 1007 (1950).

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§ 71. Injunction

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, Water Law 1329, 1339, 1368, 1378, 1396, 1406, 1536, 1538, 1547

A.L.R. Library

Propriety of injunctive relief against diversion of water by municipal corporation or public utility, 42 A.L.R.3d 426
Injunction against repeated or continuing trespasses on real property, 60 A.L.R.2d 310

Forms

- [Am. Jur. Pleading and Practice Forms, Waters § 60](#) (Complaint, petition, and declaration—To enjoin diversion of unreasonable quantity of water)
- [Am. Jur. Pleading and Practice Forms, Waters § 66](#) (Complaint, petition, and declaration—For damages and injunctive relief—Obstruction and diversion of stream by levee)
- [Am. Jur. Pleading and Practice Forms, Waters § 67](#) (Complaint, petition, and declaration—For damages and injunctive relief—Diversion of creek waters by upper riparian owner)
- [Am. Jur. Pleading and Practice Forms, Waters § 68](#) (Request for relief—Provision—To enjoin diversion of stream from its natural course)

[Am. Jur. Pleading and Practice Forms, Waters § 91](#) (Complaint, petition, and declaration—By riparian owner— Declaratory judgment—To enjoin threatened diversion of water from lake)

It is well settled that one whose rights are invaded by the wrongful diversion and use of water is entitled to the preventive remedy of injunction.¹ Any interference with a vested right to the use of water, whether from open streams, lakes, ponds, percolating or subterranean water, would entitle the party injured to damages, and an injunction would issue perpetually restraining any such interference.² When one lawful use of water is destroyed by another lawful use, the latter must yield, or it may be enjoined.³ Further, use by a nonriparian owner may be enjoined at the suit of riparian owners.⁴ A state may enjoin as a trespass a property owner's diversion of water from a stream without obtaining a permit.⁵

On the other hand, permanent injunctive relief is not warranted where, even though the diversion of a stream violates plaintiffs' riparian rights, they cannot show that they would suffer a level of irreparable harm without injunctive relief that would substantially outweigh the injury that the injunction would cause the defendants; damages, measured as the difference between the value of the property with and without the encroachment, adequately compensate the property owners.⁶

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Footnotes

1 [Wisniewski v. Gemmill](#), 123 N.H. 701, 465 A.2d 875 (1983).
As to the propriety of injunctive relief against the diversion of water by a municipal corporation or public utility, see [Am. Jur. 2d, Waterworks and Water Companies §§ 29, 30](#).

2 [Clear Springs Foods, Inc. v. Spackman](#), 150 Idaho 790, 252 P.3d 71 (2011).

3 [Harris v. Brooks](#), 225 Ark. 436, 283 S.W.2d 129, 54 A.L.R.2d 1440 (1955).

4 [Woody v. Durham](#), 267 S.W.2d 219 (Tex. Civ. App. Fort Worth 1954), writ refused (where water was diverted by a nonriparian owner for use on his nonriparian lands).

5 [People v. Shirokow](#), 26 Cal. 3d 301, 162 Cal. Rptr. 30, 605 P.2d 859 (1980).

6 [Parry v. Murphy](#), 79 A.D.3d 713, 913 N.Y.S.2d 285 (2d Dep't 2010).

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§ 72. Injunction—Public use of water

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, Water Law  1325, 1364, 1392, 1535

There is some authority to the effect that a diversion of water for a public use may not be enjoined at the instance of an individual.¹ However, the view has been taken that the granting of an injunction in such case is not improper where a reasonable opportunity is afforded for the acquisition, by condemnation proceedings, of the right of diversion.²

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Footnotes

1

[Fall River Valley Irr. Dist. v. Mt. Shasta Power Corp.](#), 202 Cal. 56, 259 P. 444, 56 A.L.R. 264 (1927).

As to rights in respect of the diversion of water for a public water supply, see [Am. Jur. 2d, Waterworks and Water Companies §§ 24 to 27](#).

As to remedies for wrongful diversion of public water supply, see [Am. Jur. 2d, Waterworks and Water Companies §§ 28 to 31](#).

2

[Town of Purcellville v. Potts](#), 179 Va. 514, 19 S.E.2d 700, 141 A.L.R. 633 (1942).

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2. Remedies and Actions

a. In General

§ 73. Requirement as to present or actual injury

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, Water Law  1331, 1334, 1370, 1373, 1398, 1401, 1540, 1543

In order to maintain an action against a diversion which diminishes the quantity or flow of a natural water course, a riparian owner must demonstrate actual harm to the owner's own reasonable use of those waters.¹ So, it has been said that a landowner will not be liable for interference with another's use of water unless an unreasonable harm is caused by the actor's withdrawal of the water.² However, a plaintiff's knowledge of the injury from an improper water diversion is not a prerequisite to operation of the public-use doctrine.³

Observation:

It is up to the State to prove what was done to a waterway illegally diverted without a permit, but once a violation of a statute protecting navigable waters has been established, a presumption favors granting an injunction to restore the environment.⁴

Where a diversion of a watercourse is committed under a claim of right, which if allowed to continue for a certain length of time would ripen into an adverse right, and deprive the plaintiff of rights in the watercourse, the plaintiff is entitled to an injunction to preserve such rights without the necessity of showing actual damage or a present use of the water.⁵

Where the owners of shore property sufficiently allege that completion of a beach erosion project is about to deprive them of the enjoyment of their property, they have stated a cause of action to permanently enjoin the project.⁶

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Footnotes

- 1 Reppun v. Board of Water Supply, 65 Haw. 531, 656 P.2d 57 (1982).
- 2 Nolte v. Michels Pipeline Const., Inc., 83 Wis. 2d 171, 265 N.W.2d 482 (1978).
- 3 Reppun v. Board of Water Supply, 65 Haw. 531, 656 P.2d 57 (1982).
- 4 State v. Poehnelt, 2010 WI App 1, 322 Wis. 2d 737, 778 N.W.2d 172 (Ct. App. 2009).
- 5 Seneca Consol. Gold Mines Co. v. Great Western Power Co. of California, 209 Cal. 206, 287 P. 93, 70 A.L.R. 210 (1930); Robertson v. Arnold, 182 Ga. 664, 186 S.E. 806, 106 A.L.R. 681 (1936).
- 6 Hack v. Sand Beach Conservancy Dist., 176 Ohio App. 3d 309, 2008-Ohio-1858, 891 N.E.2d 1228 (6th Dist. Ottawa County 2008).

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2. Remedies and Actions

a. In General

§ 74. Measure and elements of damages

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, Water Law  1338, 1377, 1405, 1548

Any interference with a vested right to the use of water, whether from open streams, lakes, ponds, percolating or subterranean water, would entitle the party injured to damages.¹ In all actions to recover damages for the wrongful diversion of water, the plaintiff can recover nothing more than nominal damages unless the plaintiff shows affirmatively that the plaintiff has suffered some special damage.² The amount of damages recoverable may be affected by the nature of the use of which the plaintiff has been deprived.³ A continuing diversion of water from a watercourse to the injury of lower proprietors has been held to be a continuing trespass or nuisance for which damages may be recovered for all injuries occurring within the period of limitations prior to the institution of the action.⁴ Successive owners of property injured by the diversion of water from a stream by a corporation organized to furnish a public water supply may maintain an action for injuries done to them as for a continuing trespass, until there has been an original lawful taking, or until damages have been recovered on the basis of a permanent unlawful taking.⁵ A landowner cannot recover damages for additional risks to his or her land posed by the diversion of a stream unless a court specifically finds that the risk remains even after any remedial action ordered by the court is taken.⁶

The measure of damages for injury to lower riparian property by the permanent diversion of water is the difference in value of the property before and after the diversion.⁷ As stated in some cases, the basis of damages for the diversion of water from a stream is the market value of the plaintiff's property with or without the water right and not the value of the property to the plaintiff.⁸

In accordance with the general rule that a person is not to be held responsible in damages for the remote consequences of the person's act, or indeed for any but those which are proximate and natural, where the diversion of water compels a lower owner

to use impure water from a well, which causes sickness, the person cannot recover damages based on such sickness, for the sickness is not a proximate result of the diversion.⁹ Also, in a suit by a lower riparian proprietor involving the right to divert water from a stream, the plans of the plaintiff to use such water, the extent of the project, and the probable cost thereof are not proper matters to be considered in assessing damages.¹⁰

Even though it appears that the owner of land on which springs are located molests and interferes with the diversions of the owner of the land benefited by the water by turning the water into natural channels, inasmuch as proof of damage to the owner of benefited land is conjectural and speculative, that owner is not entitled to damages.¹¹

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Footnotes

- 1 Clear Springs Foods, Inc. v. Spackman, 150 Idaho 790, 252 P.3d 71 (2011) (also allowing for injunctions).
- 2 Ulbricht v. Eufaula Water Co., 86 Ala. 587, 6 So. 78 (1889); Clark v. Pennsylvania R. Co., 145 Pa. 438, 22 A. 989 (1891).
- 3 Auger & Simon Silk Dyeing Co. v. East Jersey Water Co., 88 N.J.L. 273, 96 A. 60 (N.J. Ct. Err. & App. 1915).
- 4 Wong Nin v. City and County of Honolulu, 33 Haw. 379, 1935 WL 3373 (1935); Woodland v. Lyon, 78 Idaho 79, 298 P.2d 380 (1956).
- 5 Wagner v. Purity Water Co., 241 Pa. 328, 88 A. 484 (1913).
- 6 Campion v. Simpson, 104 Idaho 413, 659 P.2d 766 (1983).
- 7 Seneca Consol. Gold Mines Co. v. Great Western Power Co. of California, 209 Cal. 206, 287 P. 93, 70 A.L.R. 210 (1930).
- 8 Seneca Consol. Gold Mines Co. v. Great Western Power Co. of California, 209 Cal. 206, 287 P. 93, 70 A.L.R. 210 (1930).
- 9 Woodstock Iron Works v. Stockdale, 142 Ala. 550, 39 So. 335 (1905).
- 10 Seneca Consol. Gold Mines Co. v. Great Western Power Co. of California, 209 Cal. 206, 287 P. 93, 70 A.L.R. 210 (1930).
- 11 Parke v. Bell, 97 Idaho 67, 539 P.2d 995 (1975).

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§ 75. Jurisdiction and venue

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West's Key Number Digest

West's Key Number Digest, [Courts](#)¹₈

West's Key Number Digest, [Water Law](#)²_{1325, 1364, 1392, 1535, 1658, 1672}

Questions as to jurisdiction in actions involving rights, duties, and liabilities in respect of the diversion and use of water are governed ordinarily by the rules that are applied in other actions of a similar character.¹ In accordance with the fundamental principle that the jurisdiction of a court cannot extend beyond the territory belonging to the sovereignty on behalf of which it functions,² a court of one state cannot adjudicate rights or liabilities with regard to the diversion of water in another state.³ However, where the plaintiff and defendant are citizens of different states, a diversity case between them may, on general principles, be brought in a federal court.⁴

Practice Tip:

The retention by a court of jurisdiction to meet future problems and changing conditions is an appropriate method of carrying out the policy of a state to utilize all water available.⁵

There is a valid and important general principle of water law that a single court should have exclusive jurisdiction over an interrelated system of water rights, but that is not an inviolable rule.⁶

In a state with a water court, the jurisdiction to determine existing water rights rests exclusively with the water court.⁷ Jurisdiction of the water court extends to ancillary claims that are interrelated with the use of water or that directly affect the outcome of water matters within the exclusive jurisdiction of the water court.⁸

CUMULATIVE SUPPLEMENT

Cases:

Claimant seeking certification to the Water Court so that a determination of the existing rights of the parties could be made invoked the Water Court's jurisdiction to adjudicate validity of May 28, 1891, notice of appropriation (NOA) for portion of claim, including, without limitation, whether the claim was totally or partially abandoned. [Mont. Code Ann. §§ 3-7-501\(4\), 85-2-227\(3\), 85-2-406\(2\)\(b\)](#). [Hoon v. Murphy as Trustee for In I Am We Trust](#), [2020 MT 50](#), 399 Mont. 110, 460 P.3d 849 (2020).

[END OF SUPPLEMENT]

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Footnotes

- 1 Generally, as to jurisdiction of courts, see [Am. Jur. 2d, Courts §§ 56 to 114](#).
As to practice and procedure in suits involving the rights to water as between states, see [§ 85](#).
- 2 [Am. Jur. 2d, Courts § 105](#).
- 3 [U. S. v. District Court In and For Eagle County](#), [169 Colo. 555, 458 P.2d 760 \(1969\)](#), judgment aff'd, [401 U.S. 520, 91 S. Ct. 998, 28 L. Ed. 2d 278 \(1971\)](#).
- 4 [Am. Jur. 2d, Federal Courts §§ 635 to 637](#).
- 5 [City of Pasadena v. City of Alhambra](#), [33 Cal. 2d 908, 207 P.2d 17 \(1949\)](#).
- 6 [In re Nevada State Engineer Ruling No. 5823](#), [277 P.3d 449, 128 Nev. Adv. Op. No. 22 \(Nev. 2012\)](#).
- 7 [Fellows v. Office of Water Com'r ex rel. Perry v. Beattie Decree Case No. 371](#), [2012 MT 169, 365 Mont. 540, 285 P.3d 448 \(2012\)](#).
- 8 [Kobobel v. State, Dept. of Natural Resources](#), [249 P.3d 1127 \(Colo. 2011\)](#), cert. denied, [132 S. Ct. 252, 181 L. Ed. 2d 145 \(2011\)](#).

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§ 76. Limitation of actions; laches

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, Water Law  1330, 1369, 1397, 1539

Where the injury resulting from a wrongful diversion of water is of a permanent character, the cause of action is entire, and the period of limitations runs from the time of the occurrence of the injury. Where the diversion is only temporary or continuing and abatable, the period of limitations ordinarily runs from the time of each separate or successive injury so that a recovery may be had for all damages accruing within the period of limitations next preceding the commencement of the action.¹

Laches is recognized as a defense in causes of action to enforce riparian and littoral rights.² However, laches does not bar a state action to enforce an environmental ordinance against waterfront property owners where the State is acting for the public good, and the property owners had been warned in a timely manner that their work did not comply with the statute.³

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Footnotes

- 1 Wong Nin v. City and County of Honolulu, 33 Haw. 379, 1935 WL 3373 (1935); Wagner v. Purity Water Co., 241 Pa. 328, 88 A. 484 (1913).
- 2 Caminis v. Troy, 112 Conn. App. 546, 963 A.2d 701 (2009), judgment aff'd, 300 Conn. 297, 12 A.3d 984 (2011).
- 3 Com. v. Blair, 60 Mass. App. Ct. 741, 805 N.E.2d 1011 (2004).

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§ 77. Parties; who may complain

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West's Key Number Digest

West's Key Number Digest, Water Law  1332, 1371, 1399, 1541

Model Codes and Restatements

Restatement Second, Torts § 856

Where rights in respect of the diversion and use of water are based on riparian proprietorship, one who is not a riparian proprietor cannot ordinarily complain of a wrongful diversion or use.¹ Furthermore, the unlawful diversion of waters can ordinarily be injurious to the lower proprietor only, and so, an upper proprietor cannot complain of the diversion of water below the upper proprietor's lands.²

Governmental bodies representing the public interest may intervene in disputes between landowners where the government has a direct and legal interest in the outcome.³ A state department, such as the department of natural resources, may even be a necessary party that must be joined if the court is to have complete jurisdiction to consider the claim.⁴

Congress has given consent to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under state law, by purchase, by exchange, or

otherwise, and the United States is a necessary party to such suit.⁵ The consent to join the United States as a defendant in a state court proceeding given by the McCarran Amendment extends to the determination of federal reserved rights held on behalf of Indians⁶ although this in no way abridges any substantive claim on behalf of the Indians under the doctrine of reserved rights.⁷

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Footnotes

1 McNabb v. Houser, 171 Ga. 744, 156 S.E. 595, 74 A.L.R. 1122 (1931); Humphreys-Mexia Co. v. Arseneaux, 116 Tex. 603, 297 S.W. 225, 53 A.L.R. 1147 (1927).

2 Kennebunk, Kennebunkport and Wells Water Dist. v. Maine Turnpike Authority, 147 Me. 149, 84 A.2d 433 (1951).

Only a lower riparian proprietor can complain of the diversion of water by an upper riparian owner to nonriparian land. [American Cyanamid Co. v. Sparto](#), 267 F.2d 425 (5th Cir. 1959).

3 Koch v. Aupperle, 274 Neb. 52, 737 N.W.2d 869 (2007).

4 Portage Cty. Bd. of Commrs. v. Akron, 109 Ohio St. 3d 106, 2006-Ohio-954, 846 N.E.2d 478 (2006).

As to necessary and indispensable parties, generally, see Am. Jur. 2d, Parties §§ 9 to 12.

5 [43 U.S.C.A. § 666\(a\)](#).

The statute further provides that the United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the state laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances. However, no judgment for costs shall be entered against the United States in any such suit. [43 U.S.C.A. § 666\(a\)](#).

Summons or other process in any such suit shall be served upon the Attorney General or his designated representative. [43 U.S.C.A. § 666\(b\)](#).

Nothing in this section of the Code shall be construed as authorizing the joinder of the United States in any suit or controversy in the Supreme Court of the United States involving the right of states to the use of the water of any interstate stream. [43 U.S.C.A. § 666\(c\)](#).

6 [43 U.S.C.A. § 666](#).

7 [Colorado River Water Conservation Dist. v. U. S.](#), 424 U.S. 800, 96 S. Ct. 1236, 47 L. Ed. 2d 483 (1976).

As to the federal reserved water rights doctrine, see §§ 13 to 16.

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§ 78. Pleading and proof

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West's Key Number Digest

West's Key Number Digest, [Water Law](#) 1331, 1370, 1398, 1540

West's Key Number Digest, [Water Law](#) 1397 to 1410

Forms

[Am. Jur. Pleading and Practice Forms, Waters § 22](#) (Complaint, petition, and declaration—By applicant for appropriation permit—To enjoin diversion of water)

[Am. Jur. Pleading and Practice Forms, Waters §§ 27 to 35](#) (Complaint, petition, and declaration—To enjoin interference with water right or diversion of water)

[Am. Jur. Pleading and Practice Forms, Waters §§ 36 to 45](#) (Answer—Defenses to complaint alleging interference with water right or diversion of water)

[Am. Jur. Pleading and Practice Forms, Waters § 58](#) (Checklist—Drafting a complaint in an action to enforce riparian rights against interference or injury)

[Am. Jur. Pleading and Practice Forms, Waters §§ 78, 79](#) (Complaint, petition, or declaration— To enjoin withdrawal of unreasonable quantity of groundwater)

As in other actions, a complaint or petition in an action for wrongful diversion and use of water must contain a direct and positive averment of all the ultimate facts necessary to state a cause of action in the plaintiff's favor and against the defendant.¹

In an action for the wrongful diversion and use of water, the plaintiff has the burden of proving all the essential elements of the cause of action.²

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Footnotes

1

[Robertson v. Arnold, 182 Ga. 664, 186 S.E. 806, 106 A.L.R. 681 \(1936\).](#)

The owners of lakeshore property sufficiently alleged that completion of a community conservancy district's beach erosion project was about to deprive them of the enjoyment of their property as required to state a cause of action to permanently enjoin the project. [Hack v. Sand Beach Conservancy Dist., 176 Ohio App. 3d 309, 2008-Ohio-1858, 891 N.E.2d 1228 \(6th Dist. Ottawa County 2008\).](#)

An upper riparian landowner, who seeks judicial relief from obstruction of flow of the stream or water course by a lower riparian landowner, has the burden of showing that the acts of the lower riparian landowner were a substantial contributing cause of the damages suffered. [Screws v. Watson, 755 So. 2d 1289 \(Miss. Ct. App. 2000\).](#)

2

[Harris v. Brooks, 225 Ark. 436, 283 S.W.2d 129, 54 A.L.R.2d 1440 \(1955\).](#)

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§ 79. Trial and judgment

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, Water Law  1333, 1341, 1372, 1380, 1400, 1408, 1542, 1549

Forms

[Am. Jur. Pleading and Practice Forms, Waters § 52](#) (Judgment or decree—Provision—Enjoining diversion of stream to injury of prior appropriator)

[Am. Jur. Pleading and Practice Forms, Waters § 53](#) (Judgment or decree—Provision—Enjoining diversion of stream to injury of subsequent appropriator)

[Am. Jur. Pleading and Practice Forms, Waters § 72](#) (Finding of fact—Division of water between channels of stream)

[Am. Jur. Pleading and Practice Forms, Waters § 76](#) (Judgment or decree—Provision—Enjoining diversion of water except for riparian uses)

Where the facts as to the diversion of water from a natural watercourse by a riparian owner are not in dispute, the question whether such diversion is the exercise of a riparian right is one of law.¹

Neither a finding that a flood was an "act of God" nor that parties other than the abutting landowner helped to cause the diversion of a river precludes a second landowner whose property was damaged by the diverted flood waters from recovering the full amount of damages from the abutting landowner who altered the course of the river. However, testimony as to the value which the property would have had at the time of trial were it not for the damage caused by the diversion of the stream and testimony

as to the current value of the property at the time of the trial is insufficient to show a diminution in the value caused by the flooding at the time of the flooding.²

CUMULATIVE SUPPLEMENT

Cases:

The Water Court reviews a Water Master's findings of fact to determine whether they are clearly erroneous. [Eldorado Co-op Canal Co. v. Lower Teton Joint Objectors](#), 2014 MT 272, 376 Mont. 420, 337 P.3d 74 (2014).

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Footnotes

1 [Seneca Consol. Gold Mines Co. v. Great Western Power Co. of California](#), 209 Cal. 206, 287 P. 93, 70 A.L.R. 210 (1930).

2 [Campion v. Simpson](#), 104 Idaho 413, 659 P.2d 766 (1983).

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3. Rights as Between States

a. In General

§ 80. Generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Water Law](#) 1853, 1854

The U.S. Supreme Court has original and exclusive jurisdiction of all controversies between two or more states,¹ and this includes disputes over riparian rights.²

The power of a state over the waters within its borders is limited by vested rights that other states have to the water. One state may not unreasonably appropriate the waters of a river within its borders, to the injury of another state through which such river flows.³ However, as between states from one of which a stream flows to the other, the lower state is not entitled to have the stream flow as it would in nature regardless of need or use.⁴ A state may be allowed to divert water for the domestic use of its inhabitants from streams feeding a river flowing through another state although the effect of such diversion is to remove the water to another watershed.⁵

Observation:

A suit by states challenging the Army Corps of Engineers' allocation of reservoir water is not the type of dispute between states that comes within the Supreme Court's exclusive jurisdiction;⁶ states in such a suit are not seeking relief from each other or from harm caused by another state but rather judicial construction of the Corps' statutory and contractual obligations.⁷

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Footnotes

1 28 U.S.C.A. § 1251(a).

2 *Montana v. Wyoming*, 131 S. Ct. 1765, 179 L. Ed. 2d 799 (2011) (alleged breach of water compact); *South Carolina v. North Carolina*, 558 U.S. 256, 130 S. Ct. 854, 175 L. Ed. 2d 713, 57 A.L.R. Fed. 2d 663 (2010) (apportionment of waters of interstate stream); *New Jersey v. Delaware*, 552 U.S. 597, 128 S. Ct. 1410, 170 L. Ed. 2d 315 (2008) (right to build facility on Delaware River extending over state line).

3 *State of Wyo. v. State of Colo.*, 298 U.S. 573, 56 S. Ct. 912, 80 L. Ed. 1339 (1936); *State of Arizona v. State of California*, 298 U.S. 558, 56 S. Ct. 848, 80 L. Ed. 1331 (1936).

4 *State of Colo. v. State of Kan.*, 320 U.S. 383, 64 S. Ct. 176, 88 L. Ed. 116 (1943).

5 *State of New Jersey v. State of New York*, 283 U.S. 336, 51 S. Ct. 478, 75 L. Ed. 1104 (1931).

6 28 U.S.C.A. § 1251(a).

7 *Alabama v. U.S. Army Corps of Engineers*, 424 F.3d 1117 (11th Cir. 2005).

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3. Rights as Between States

a. In General

§ 81. Voluntary settlement; compacts

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Water Law](#) 1853, 1854

Rights as between states in respect of the diversion and use of the waters of interstate streams may be fixed by voluntary agreement or compact, and this mode of settlement of controverted rights has been expressly recommended by the United States Supreme Court.¹ In entering into a compact with a view to making an equitable apportionment between them of the waters of an interstate stream, it is within the power of the states to make the apportionment either by providing for a continuous equal division of the water from time to time in the stream or by providing for alternate periods of flow to the one state or the other of all the water in the stream.²

An apportionment of the waters of an interstate stream by means of a compact between the states through which it flows is binding upon the citizens of each state and all water claimants even where the water rights had been granted by the State before it entered into the compact.³ A compact between two states providing that each state may, on its own side of a riparian border, exercise jurisdiction of every kind and nature, and make grants, leases, and conveyances of riparian lands and rights under the laws of the respective states, does not grant one state exclusive jurisdiction over all riparian improvements extending out from the low-water mark beyond the state's territorial border; the unusual term "riparian jurisdiction" is not synonymous with "exclusive jurisdiction."⁴

CUMULATIVE SUPPLEMENT

Cases:

State of New Mexico was entitled to delivery credit under the Pecos River Compact, which provided for equitable apportionment of the use of the River's water by New Mexico and Texas, for water that evaporated while it was being stored in New Mexico at Texas's request, in order to prevent flooding from tropical storm; Texas requested that New Mexico store water that otherwise would have flowed across the state line and counted toward Texas's allocation, New Mexico agreed to do so and held the water for Texas, and Texas did not rescind its request for storage or otherwise ask for release prior to its eventual release. [Texas v. New Mexico, 141 S. Ct. 509 \(2020\)](#).

After entering into settlement providing that groundwater pumping would count towards water consumption permitted by the Republican River Compact, State of Nebraska knowingly exposed State of Kansas to a substantial risk of receiving less water than provided for in the Compact, and thus knowingly failed to comply with the obligations that agreement imposed; Nebraska delayed for several years in taking corrective action to decrease groundwater pumping, and water management plans finally adopted called for only a 5% reduction in groundwater pumping, without creating a way to enforce that goal. Act of May 26, 1943, ch. 104, 57 Stat. 86. [Kansas v. Nebraska, 135 S. Ct. 1042 \(2015\)](#).

Disgorgement award requiring State of Nebraska to pay State of Kansas only a portion of its additional gain from its breach of the Republican River Compact through its consumption of 17% more water than its proper share, rather than award of all of Nebraska's gain or award of treble damages, was a fair and equitable remedy; Nebraska altered its conduct after the breach and had complied with the Compact ever since, implemented a new round of water management plans calling for localities to reduce groundwater pumping by five times as much as the old target, and implemented a system for the State, in dry years, to force water districts to curtail both surface water use and groundwater pumping. Act of May 26, 1943, ch. 104, 57 Stat. 86. [Kansas v. Nebraska, 135 S. Ct. 1042 \(2015\)](#).

After it was determined that State of Nebraska breached the Republican River Compact by consuming 17% more water than its proper share, State of Kansas was not entitled to injunction ordering Nebraska to comply with the Compact and a related settlement; Kansas failed to show a cognizable danger of recurrent violation, given Nebraska's new compliance measures designed to keep the State within its allotment, and Nebraska was on notice that it was subject to disgorgement of gains. Act of May 26, 1943, ch. 104, 57 Stat. 86. [Kansas v. Nebraska, 135 S. Ct. 1042 \(2015\)](#).

Settlement agreement's accounting procedures, which inadvertently charged State of Nebraska for using water imported from outside the Republican River basin for irrigation in the basin, could be amended to ensure that Nebraska's consumption of such imported water would not count toward its allotment under the Republican River Compact; because the Compact only apportioned the virgin water supply of the Republican River and its tributaries, the accounting procedures exceeded scope of the Compact and deprived Nebraska of its rights under the Compact. Act of May 26, 1943, ch. 104, 57 Stat. 86. [Kansas v. Nebraska, 135 S. Ct. 1042 \(2015\)](#).

Provision of congressionally-approved interstate compact allocating water rights among the States within the Red River basin that afforded each signatory State an equal opportunity to make use of the excess water within a particular subbasin of the River did not grant Texas state agency the right to cross state lines and divert water from Oklahoma, even though the provision was silent with respect to state lines, in light of the principle that States do not easily cede their sovereign powers, the fact that other interstate water compacts treated cross-border rights explicitly, and the parties' conduct under the compact. 94 Stat. 3305 § 5.05(b)(1). [Tarrant Regional Water Dist. v. Herrmann, 133 S. Ct. 2120 \(2013\)](#).

Congressionally-approved interstate compact allocating water rights among the States within the Red River basin left no waters unallocated, and therefore Oklahoma water statutes could not discriminate against interstate commerce with respect to unallocated waters under the compact under a dormant Commerce Clause theory. [U.S.C.A. Const. Art. 1, § 8, cl. 3; 82 Okl.St.Ann. §§ 105.12, 105.12A, 1086.1. Tarrant Regional Water Dist. v. Herrmann, 133 S. Ct. 2120 \(2013\)](#).

[END OF SUPPLEMENT]

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Footnotes

1 [State of Colo. v. State of Kan.](#), 320 U.S. 383, 64 S. Ct. 176, 88 L. Ed. 116 (1943).
It is preferable that states settle their controversies as to water by mutual accommodation and agreement.
[State of Ariz. v. State of Cal.](#), 373 U.S. 546, 83 S. Ct. 1468, 10 L. Ed. 2d 542 (1963), judgment entered, 376 U.S. 340, 84 S. Ct. 755, 11 L. Ed. 2d 757 (1964), amended on other grounds, 383 U.S. 268, 86 S. Ct. 924, 15 L. Ed. 2d 743 (1966) and order amended on other grounds, 466 U.S. 144, 104 S. Ct. 1900, 80 L. Ed. 2d 194 (1984), subsequent determination, 530 U.S. 392, 120 S. Ct. 2304, 147 L. Ed. 2d 374 (2000), supplemented, 531 U.S. 1, 121 S. Ct. 292, 148 L. Ed. 2d 1 (2000) and (disavowed on other grounds by, [California v. U. S.](#), 438 U.S. 645, 98 S. Ct. 2985, 57 L. Ed. 2d 1018 (1978)).

2 [Hinderlider v. La Plata River & Cherry Creek Ditch Co.](#), 304 U.S. 92, 58 S. Ct. 803, 82 L. Ed. 1202 (1938).

3 [Hinderlider v. La Plata River & Cherry Creek Ditch Co.](#), 304 U.S. 92, 58 S. Ct. 803, 82 L. Ed. 1202 (1938).

4 [New Jersey v. Delaware](#), 552 U.S. 597, 128 S. Ct. 1410, 170 L. Ed. 2d 315 (2008).

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78 Am. Jur. 2d Waters § 82

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Waters

Janice Holben, J.D., Alan J. Jacobs, J.D., Jack K. Levin, J.D., and Eric C. Surette, J.D.

II. Water Rights, Interests, and Uses

C. Diversion and Extraction of Water and Its Use

3. Rights as Between States

b. Adjudication and Enforcement

§ 82. Generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, Water Law 1834(2), 1848, 1849, 1853, 1854

The relative rights of states and their respective inhabitants in respect of the diversion and use of the waters of interstate streams may be adjudicated and enforced in a suit instituted for such purpose.¹ In determining the question of reasonableness of the diversion of water by a state where the rights of another state are affected, the court will give due consideration to the interests of both states.² In the absence of statute, the Supreme Court of the United States resolves interstate water claims by the doctrine of equitable apportionment, under which such claims are decided according to the equities.³ This does not mean that there must be an equal division of the waters of such a stream among the states through which it flows but means that the principles of right and equity shall be applied, having regard to the equal level or plane on which all the states stand in point of power and right under the Constitution.⁴ No hard and fast rule requires that an equitable allocation of the waters of such a stream be a mass allocation in all cases.⁵ The equitable share of a state may be determined with such limitations as the equity of the situation requires and irrespective of the indirect effect which that determination may have on individual rights within the state.⁶ Accordingly, in the determination of an equitable apportionment of water of an interstate river, the rule of priority is not the sole criterion as while the equities supporting the protection of established, senior users are substantial, it is also appropriate to consider additional factors relevant to a just apportionment, such as conservation measures available to both states and a balance of the harm and benefit that might result from the diversion.⁷

Where Congress has exercised its constitutional power over interstate waters by legislation allocating the waters among different states, courts have no power to substitute their own notions of "equitable apportionment" for the apportionment chosen by Congress.⁸ The Boulder Canyon Project Act,⁹ for instance, provides the method for the complete apportionment among Arizona,

California, and Nevada of the mainstream waters of the Colorado River to which those states are entitled.¹⁰ Nevertheless, the Supreme Court of the United States should exercise its jurisdiction to adjudicate a controversy between states over the water of the Colorado River where the states despite repeated efforts have been unable to settle the dispute, the resolution of the dispute requires the interpretation of a federal statute and a determination of what powers are conferred by the statute on the Secretary of the Interior, and unless many of the issues presented by the case are adjudicated, the conflicting claims of the parties will continue to raise serious doubts as to the extent of each state's right to appropriate water from the Colorado River system for existing or new uses.¹¹

An act of Congress appropriating funds for a water storage and irrigation project, in providing that the construction, operation, and maintenance of such project shall not interfere with the present vested rights or the fullest use thereafter for all beneficial purposes of the waters of the stream in question or any of its tributaries within the drainage basin thereof in an upstream state, does not preclude the imposition, in a suit between the states through which such stream flows for an equitable apportionment of its waters, of restrictions on future uses of water by the upstream state.¹²

CUMULATIVE SUPPLEMENT

Cases:

Factors which create equities in favor of one State or the other and must be weighed in resolving an interstate water matter include, but are not limited to: physical and climatic conditions, the consumptive use of water in the several sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, and the damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former. [Florida v. Georgia, 138 S. Ct. 2502 \(2018\)](#).

Remand to Special Master was required in dispute between Florida, as downstream State, and Georgia, as upstream State, over apportionment of water in an interstate river basin to determine how much extra water would flow into Florida as result of proposed cap on Georgia's water use, and whether the amount of extra water that reached a Florida river through a dam controlled by the Army Corps of Engineers would significantly redress the economic and ecological harm that Florida had suffered as result of decreased water flow. [Florida v. Georgia, 138 S. Ct. 2502 \(2018\)](#).

Supreme Court has inherent authority, as part of the Constitution's grant of original jurisdiction to hear suits between the States, to equitably apportion interstate streams between States. [U.S.C.A. Const. Art. 3, § 2, cl. 1 et seq. Kansas v. Nebraska, 135 S. Ct. 1042 \(2015\)](#).

Supreme Court's authority to devise fair and equitable solutions to interstate water disputes encompasses modifying a technical agreement to correct material errors in the way it operates and thus align it with the compacting States' intended apportionment. [Kansas v. Nebraska, 135 S. Ct. 1042 \(2015\)](#).

Absent an agreement among the States, disputes over the allocation of water are subject to equitable apportionment by the courts. [Tarrant Regional Water Dist. v. Herrmann, 133 S. Ct. 2120 \(2013\)](#).

[END OF SUPPLEMENT]

1 State of Ariz. v. State of Cal., 373 U.S. 546, 83 S. Ct. 1468, 10 L. Ed. 2d 542 (1963), judgment entered, 376 U.S. 340, 84 S. Ct. 755, 11 L. Ed. 2d 757 (1964), amended on other grounds, 383 U.S. 268, 86 S. Ct. 924, 15 L. Ed. 2d 743 (1966) and order amended on other grounds, 466 U.S. 144, 104 S. Ct. 1900, 80 L. Ed. 2d 194 (1984), subsequent determination, 530 U.S. 392, 120 S. Ct. 2304, 147 L. Ed. 2d 374 (2000), supplemented, 531 U.S. 1, 121 S. Ct. 292, 148 L. Ed. 2d 1 (2000) and (disavowed on other grounds by, *California v. U. S.*, 438 U.S. 645, 98 S. Ct. 2985, 57 L. Ed. 2d 1018 (1978)).

2 As to the original jurisdiction of the Supreme Court of the United States for the adjudication of controversies between states as to rights in respect of the waters of interstate streams, see *Am. Jur. 2d, Federal Courts* § 500.

3 State of Colo. v. State of Kan., 320 U.S. 383, 64 S. Ct. 176, 88 L. Ed. 116 (1943).

4 State of Ariz. v. State of Cal., 373 U.S. 546, 83 S. Ct. 1468, 10 L. Ed. 2d 542 (1963), judgment entered, 376 U.S. 340, 84 S. Ct. 755, 11 L. Ed. 2d 757 (1964), amended on other grounds, 383 U.S. 268, 86 S. Ct. 924, 15 L. Ed. 2d 743 (1966) and order amended on other grounds, 466 U.S. 144, 104 S. Ct. 1900, 80 L. Ed. 2d 194 (1984), subsequent determination, 530 U.S. 392, 120 S. Ct. 2304, 147 L. Ed. 2d 374 (2000), supplemented, 531 U.S. 1, 121 S. Ct. 292, 148 L. Ed. 2d 1 (2000) and (disavowed on other grounds by, *California v. U. S.*, 438 U.S. 645, 98 S. Ct. 2985, 57 L. Ed. 2d 1018 (1978)).

5 In determining a controversy between states through which a river flows, over the right of one of them to divert water for the domestic use of its inhabitants, a more liberal answer may be given than in a controversy between individual riparian owners. The effort always is to secure an equitable apportionment without quibbling over formulae. *State of New Jersey v. State of New York*, 283 U.S. 336, 51 S. Ct. 478, 75 L. Ed. 1104 (1931).

6 State of Connecticut v. Com. of Mass., 282 U.S. 660, 51 S. Ct. 286, 75 L. Ed. 602 (1931).

7 Nebraska v. Wyoming, 325 U.S. 589, 65 S. Ct. 1332, 89 L. Ed. 1815 (1945).

8 Nebraska v. Wyoming, 325 U.S. 589, 65 S. Ct. 1332, 89 L. Ed. 1815 (1945).

9 Colorado v. New Mexico, 459 U.S. 176, 103 S. Ct. 539, 74 L. Ed. 2d 348 (1982).

10 State of Ariz. v. State of Cal., 373 U.S. 546, 83 S. Ct. 1468, 10 L. Ed. 2d 542 (1963), judgment entered, 376 U.S. 340, 84 S. Ct. 755, 11 L. Ed. 2d 757 (1964), amended on other grounds, 383 U.S. 268, 86 S. Ct. 924, 15 L. Ed. 2d 743 (1966) and order amended on other grounds, 466 U.S. 144, 104 S. Ct. 1900, 80 L. Ed. 2d 194 (1984), subsequent determination, 530 U.S. 392, 120 S. Ct. 2304, 147 L. Ed. 2d 374 (2000), supplemented, 531 U.S. 1, 121 S. Ct. 292, 148 L. Ed. 2d 1 (2000) and (disavowed on other grounds by, *California v. U. S.*, 438 U.S. 645, 98 S. Ct. 2985, 57 L. Ed. 2d 1018 (1978)).

11 43 U.S.C.A. §§ 617 to 617u.

12 State of Ariz. v. State of Cal., 373 U.S. 546, 83 S. Ct. 1468, 10 L. Ed. 2d 542 (1963), judgment entered, 376 U.S. 340, 84 S. Ct. 755, 11 L. Ed. 2d 757 (1964), amended on other grounds, 383 U.S. 268, 86 S. Ct. 924, 15 L. Ed. 2d 743 (1966) and order amended on other grounds, 466 U.S. 144, 104 S. Ct. 1900, 80 L. Ed. 2d 194 (1984), subsequent determination, 530 U.S. 392, 120 S. Ct. 2304, 147 L. Ed. 2d 374 (2000), supplemented, 531 U.S. 1, 121 S. Ct. 292, 148 L. Ed. 2d 1 (2000) and (disavowed on other grounds by, *California v. U. S.*, 438 U.S. 645, 98 S. Ct. 2985, 57 L. Ed. 2d 1018 (1978)).

13 State of Ariz. v. State of Cal., 373 U.S. 546, 83 S. Ct. 1468, 10 L. Ed. 2d 542 (1963), judgment entered, 376 U.S. 340, 84 S. Ct. 755, 11 L. Ed. 2d 757 (1964), amended on other grounds, 383 U.S. 268, 86 S. Ct. 924, 15 L. Ed. 2d 743 (1966) and order amended on other grounds, 466 U.S. 144, 104 S. Ct. 1900, 80 L. Ed. 2d 194 (1984), subsequent determination, 530 U.S. 392, 120 S. Ct. 2304, 147 L. Ed. 2d 374 (2000), supplemented, 531 U.S. 1, 121 S. Ct. 292, 148 L. Ed. 2d 1 (2000) and (disavowed on other grounds by, *California v. U. S.*, 438 U.S. 645, 98 S. Ct. 2985, 57 L. Ed. 2d 1018 (1978)).

14 Nebraska v. Wyoming, 325 U.S. 589, 65 S. Ct. 1332, 89 L. Ed. 1815 (1945).

78 Am. Jur. 2d Waters § 83

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Waters

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3. Rights as Between States

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§ 83. Effect of state law as to riparian or appropriatory rights

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, Water Law  1848, 1849, 1853, 1854

It has been stated that the common-law rule in force in both states through which a river flows, under which each riparian owner has a vested right in the use of the flowing waters and is entitled to have them flow as they were wont, unimpaired as to quantity and uncontaminated as to quality, does not constitute a dependable guide or just basis for the decision of a controversy between such states over the right of one of them to divert water from the river to provide a supply for the domestic use of its inhabitants and that while the municipal law relating to like questions between individuals is to be taken into account, it is not to be deemed to have controlling weight.¹ However, where the doctrine of prior appropriation prevails in the states involved,² it has been held in some cases that it should be applied,³ and in others that priority of appropriation may properly be taken into account,⁴ in making an apportionment between states. However, the adoption of the rule or doctrine of prior appropriation as a guiding principle in making such an apportionment does not preclude the consideration of other factors, such as physical and climatic conditions, the consumptive use of water in the several sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, and the damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former.⁵ An established economy in an upper part of the basin, based on existing use of the water, should be protected, regardless of the fact that the same amount of water might produce more in lower sections of the river,⁶ and a state should not be limited in annual transbasin diversions to the average annual amount of such diversions, which has been exceeded by annual diversions so that the proposed annual limitation would interfere with existing users.⁷

Footnotes

1 [State of Connecticut v. Com. of Mass.](#), 282 U.S. 660, 51 S. Ct. 286, 75 L. Ed. 602 (1931).

2 As to the extent of recognition of the doctrine of prior appropriation, see § 356.

3 [State of Wyo. v. State of Colo.](#), 259 U.S. 419, 42 S. Ct. 552, 66 L. Ed. 999 (1922), decision modified on other grounds on denial of reh'g, 260 U.S. 1, 43 S. Ct. 2, 66 L. Ed. 1026 (1922) and decree vacated on other grounds, [353 U.S. 953](#), 77 S. Ct. 865, 1 L. Ed. 2d 906 (1957).

4 [Nebraska v. Wyoming](#), 325 U.S. 589, 65 S. Ct. 1332, 89 L. Ed. 1815 (1945).

5 Am. Jur. 2d, Irrigation § 19.

6 Am. Jur. 2d, Irrigation § 19.

7 [Nebraska v. Wyoming](#), 325 U.S. 589, 65 S. Ct. 1332, 89 L. Ed. 1815 (1945).

78 Am. Jur. 2d Waters § 84

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§ 84. Injunction

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West's Key Number Digest

West's Key Number Digest, Water Law 1400, 1671

A state may, in a proper case, be enjoined from diverting an unreasonable amount of water from an interstate stream to the injury of another state or its inhabitants.¹ In order to warrant the issuance of an injunction, however, imminent danger of substantial injury must be clearly established.² The diversion of water by a state from an interstate stream for the domestic use of its inhabitants will not be enjoined at the suit of a lower state where other available sources of supply for the upper state are so contaminated at points beyond its control as to require purification, and are inferior from an engineering standpoint, and no substantial injury or damage to navigation or existing power development, or deleterious effect upon fish life, or pollution of the river is established.³ An injunction has been denied on the ground that the complaining state is not exercising, and may never exercise, its right of appropriation or diversion.⁴

Practice Tip:

A state seeking to prevent or enjoin a diversion of water by another state bears the burden of proving that the diversion will cause it real or substantial injury or damage, and that rule applies even if the State seeking to prevent or enjoin a diversion is the nominal defendant in a lawsuit.⁵

Assurance on behalf of a defendant state that a resumption of diversions of water from an interstate stream will not be permitted if they are held to contravene a previously rendered decree of the Supreme Court of the United States affirming and establishing the respective rights of the states and their water claimants to appropriate the water of an interstate stream renders unnecessary a present injunction to enforce adherence to the decree.⁶

CUMULATIVE SUPPLEMENT

Cases:

In light of the sovereign status and equal dignity of States, a complaining State in dispute between two states with competing claims to interstate water must bear a burden that is much greater than the burden ordinarily shouldered by a private party seeking an injunction. [Florida v. Georgia, 138 S. Ct. 2502 \(2018\)](#).

[END OF SUPPLEMENT]

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Footnotes

- 1 [State of Wyo. v. State of Colo., 298 U.S. 573, 56 S. Ct. 912, 80 L. Ed. 1339 \(1936\)](#).
- 2 [State of Washington v. State of Oregon, 297 U.S. 517, 56 S. Ct. 540, 80 L. Ed. 837 \(1936\)](#).
- 3 [State of Connecticut v. Com. of Mass., 282 U.S. 660, 51 S. Ct. 286, 75 L. Ed. 602 \(1931\)](#).
- 4 [State of Washington v. State of Oregon, 297 U.S. 517, 56 S. Ct. 540, 80 L. Ed. 837 \(1936\); State of New Jersey v. State of New York, 283 U.S. 336, 51 S. Ct. 478, 75 L. Ed. 1104 \(1931\)](#).
The construction of a dam under authority of an act of Congress for the purpose of impounding the floodwaters of a river in aid of navigation and using such waters for irrigation and power development will not be enjoined on the ground that by the taking of such waters for irrigation in one state another state will be deprived of its right to make appropriations thereof where the waters to which it is entitled have not been and may never be appropriated. [State of Arizona v. State of California, 283 U.S. 423, 51 S. Ct. 522, 75 L. Ed. 1154 \(1931\)](#).
- 5 [One state is not entitled to an injunction against the diversion of water by another state from an international waterway because the diversion may interfere with use by the complainant and its citizens of the water for the development of power where no present use or definite project for such use is shown, and no consent of the United States and the other interested country to such use is shown. State of New York v. State of Illinois, 274 U.S. 488, 47 S. Ct. 661, 71 L. Ed. 1164 \(1927\)](#).
- 6 [Colorado v. New Mexico, 459 U.S. 176, 103 S. Ct. 539, 74 L. Ed. 2d 348 \(1982\)](#).
- 7 [State of Wyo. v. State of Colo., 298 U.S. 573, 56 S. Ct. 912, 80 L. Ed. 1339 \(1936\)](#).

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§ 85. Jurisdiction; parties; evidence; proof

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, Water Law 1536, 1679, 1834

Suits between states regarding the diversion and use of interstate waters are brought in the United States Supreme Court, which has original jurisdiction of such suits.¹

A state in which a river draining a considerable part of its area rises is not an indispensable party to a suit between other states through which such river flows for an equitable apportionment of its waters as between the two states.² Nor is the Secretary of the Interior an indispensable party to a suit between states for an equitable apportionment of the waters of a river flowing from one state into another, by reason of the construction and operation by the United States, in the former state, of reservoirs for the storage of water to be used for irrigation, where the rights of the Secretary as an appropriator of the waters of the river rise no higher than those of the State, from which he must obtain permission to appropriate such waters.³ However, even though no decree in a suit between states to determine their relative rights to appropriate the waters of a navigable river, rendered in the absence of the United States, can bind or affect the United States, the United States Supreme Court will not undertake to decide the rights of the parties who are before it by a decree which, because of the absence of the United States, could have no finality.⁴

Practice Tip:

The standard is high for intervention by nonstate entities in a cause of action within the original jurisdiction of the Supreme Court, but the standard is not insurmountable, and such intervention is allowed in compelling circumstances. A bistate agency whose

operations are premised on maintaining a fine balance between the water interests of counties in different states satisfies the burden of demonstrating a compelling interest in the outcome of the litigation, which serves to distinguish it from all other citizens of the party states. Likewise, an energy company operating many dams and reservoirs in both states was a suitable intervenor.⁵

The Supreme Court does not approach the task of deciding what is a just and equitable apportionment of waters of an interstate stream in formulaic fashion but considers all relevant factors, including, but not limited to, physical and climatic conditions, the consumptive use of water in several sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, and the damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former.⁶

The burden resting on a state seeking to prevent another state from diverting waters from a stream flowing through both, to show damage or wrongdoing, is much greater than that generally required to be borne by one seeking an injunction in a suit between private parties.⁷

CUMULATIVE SUPPLEMENT

Cases:

Supreme Court has inherent authority, as part of the Constitution's grant of original jurisdiction, to equitably apportion interstate streams between States. U.S.C.A. Const. Art. 3, § 2. [Florida v. Georgia, 138 S. Ct. 2502 \(2018\)](#).

[END OF SUPPLEMENT]

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Footnotes

- 1 [Am. Jur. 2d, Federal Courts § 500](#).
- 2 [State of Nebraska v. State of Wyoming, 295 U.S. 40, 55 S. Ct. 568, 79 L. Ed. 1289 \(1935\)](#).
- 3 [State of Nebraska v. State of Wyoming, 295 U.S. 40, 55 S. Ct. 568, 79 L. Ed. 1289 \(1935\)](#).
- 4 [State of Arizona v. State of California, 298 U.S. 558, 56 S. Ct. 848, 80 L. Ed. 1331 \(1936\)](#).
- 5 [South Carolina v. North Carolina, 558 U.S. 256, 130 S. Ct. 854, 175 L. Ed. 2d 713, 57 A.L.R. Fed. 2d 663 \(2010\)](#) (however, a municipality was not an entity from which downstream state was seeking any direct relief and would not be allowed to intervene).
- 6 [South Carolina v. North Carolina, 558 U.S. 256, 130 S. Ct. 854, 175 L. Ed. 2d 713, 57 A.L.R. Fed. 2d 663 \(2010\)](#).
- 7 [State of Washington v. State of Oregon, 297 U.S. 517, 56 S. Ct. 540, 80 L. Ed. 837 \(1936\)](#).